Supreme Court, U.S.
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No. 04-___

IN THE

Supreme Court of the United States

DONALD M. ADKINS,

Petitioner,

v.

DON KASPAR, CHAPLAINCY DEPARTMENT, ET AL.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether this Court should resolve the circuit conflict—both expressly acknowledged and deepened by the Fifth Circuit in this case—over what constitutes a "substantial burden" on religious exercise under the Religious Land Use and Institutionalized Persons Act.

2. Whether the Fifth Circuit properly declined—in conflict with the decisions of this Court and other circuits—to vacate its decision after being informed that the petitioner had been released on parole before the date of that decision.

PARTIES TO THE PROCEEDINGS

Petitioner Donald M. Adkins was the plaintiff-appellant below. Respondents were defendants-appellees below and are officials within the Coffield Unit of the Texas prison system: Don Kaspar, Chaplaincy Department; Roy A. Garcia, Warden, Coffield Unit; Michael W. Sizemore, Assistant Warden, Coffield Unit; Kenneth M. Reynolds, Chaplain, Coffield Unit; Larry Hart, Assistant Chaplain, Coffield Unit; Kevin Moore, Senior Warden, Coffield Unit; and Leonard Sanchez, Senior Chaplain, Coffield Unit.

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PETITION FOR A WRIT OF CERTIORARI

Donald M. Adkins respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 393 F.3d 559 and is reproduced in the appendix hereto ("App.") at 1a. The report and recommendation of the United States Magistrate Judge is reproduced at App. 24a. The order of the United States District Court for the Eastern District of Texas adopting that recommendation and entering judgment is reproduced at App. 21a. The order of the Fifth Circuit denying petitioner's

motion to recall the mandate and vacate the court of appeals decision is reproduced at App. 45a.

JURISDICTION

The judgment of the Court of Appeals was entered on December 8, 2004. *Id.* at 1a. On February 25, 2005, Justice Scalia granted petitioner's application for an extension of time within which to file a petition for a writ of certiorari to and including April 7, 2005. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I.

The relevant provisions of the Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803 (codified at 42 U.S.C. § 2000cc *et seq.*), are reproduced in the appendix to this petition at App. 53a.

INTRODUCTION

This case involves a claim brought under the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc *et seq.*, by a state prisoner, petitioner Donald M. Adkins, who was barred by prison officials, respondents, from assembling to observe the Sabbath and other holy days of his religion—activities that "easily qualify as 'religious exercise' under RLUIPA." App. 13a. In rejecting that claim, the Fifth Circuit expressly acknowledged and deepened the multi-dimensional circuit conflict over "[w]hat constitutes a 'substantial burden' under the RLUIPA." *Id.* The direct circuit conflict over the Act's definition of "substantial burden" has created nationwide confusion for religious adherents and state and local officials alike. That is particularly true in the United States prison system, where religious exercise has vital importance to

hundreds of thousands of individuals and prison officials are routinely required to make decisions about what religious practices to accommodate. Indeed, respondents themselves have declared that the decision in this case is of the "utmost importance" because of the size of Texas's prison population and number of RLUIPA claims. *Id.* at 49a. This Court's guidance is critically needed to resolve the growing conflict over the scope of RLUIPA's "substantial burden" test.[1]

This case also presents a threshold question that is even more fundamental to the operation of the federal courts than the scope of RLUIPA's "substantial burden" requirement. Shortly before the Fifth Circuit rendered its decision, Mr. Adkins was released on parole. Because Mr. Adkins's complaint sought only equitable relief, his release appears to have mooted his RLUIPA claim. The Fifth Circuit, however, refused to vacate its decision after being apprised of Mr. Adkins's release. That ruling is necessarily grounded on one of two holdings: either the Fifth Circuit (1) concluded that the case was not moot, in conflict with the decisions of other circuits; or (2) it adopted respondents' request to invoke an "important issue" exception to the mootness doctrine, in direct conflict with this Court's decisions. *See, e.g.*, *Amalgamated Ass'n of Street, Elec., Ry. & Motor Coach Employees* v. *Wisconsin Employment Relations Bd.*, 340 U.S. 416 (1951); *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950). Either way, the court's refusal to vacate its decision deepening the conflict on RLUIPA's "substantial burden" test independently warrants this Court's review.

STATEMENT OF THE CASE

Mr. Adkins's Incarceration and Religious Practice. Mr. Adkins was incarcerated in the Texas prison system from

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[1] In *Cutter* v. *Wilkinson*, No. 03-9877 (argued Mar. 21, 2005), this Court is weighing a challenge to the constitutionality of RLUIPA. That claim is not presented by this case. App. 18a n.52. However, the Court may wish to defer consideration of this petition until that threshold constitutional challenge is resolved.

1987 through October 2004. In December 1999, he was baptized into the Yahweh Evangelical Assembly (YEA), after concluding that he needed to "change his life, because if he d[id] not, he ha[d] nothing to get out of prison for." App. 31a. The YEA faith "contains certain elements of traditional Judaism as well as a belief in Yahshua (Jesus) as the Messiah." *Id.* at 25a. The fundamental religious tenets of YEA include a Sabbath, lasting from Friday sundown to Saturday sundown. *Id.* at 28a. YEA requires its adherents to meet on the Sabbath and to observe particular holy days. *Id.* at 3a. In the YEA faith, "failure to assemble for worship on the Holy Days amount[s] to 'sin,' for which the penalty is 'death.' " *Id.* at 42a n.7. Mr. Adkins is a devout member of YEA and student of his faith. *Id.* at 30a.

During the relevant time period, Mr. Adkins was imprisoned at the Coffield Unit (Coffield) within the Texas prison system. There are at least 20 to 25 inmates at Coffield who are "active, participating members of [YEA]" and several others who receive YEA literature. *Id.* at 36a. YEA inmates incarcerated at Coffield are permitted to assemble and observe only *one* Sabbath per month and are not otherwise permitted to observe their holy days. *Id.* at 29a. By contrast, "Christians [at Coffield] get services every week, Jehovah's Witnesses get services once a week, and Muslims get services twice a week." *Id.* at 31a.

Respondents acknowledge that they deny YEA members the right to assemble and hold services on their Sabbath and holy days—including "the most important holy day of the year" for adherents to the YEA faith, *id.* at 32a—unless an "accredited [outside] religious volunteer" is present. *Id.* at 4a. And even though other individuals had completed the requisite training and sought permission to lead YEA services at Coffield, respondents refused to grant "accredited religious volunteer" status to anyone but a single volunteer, YEA elder Jerry Healan. *Id.* at 29a-31a. Mr. Healan, who lives 175 miles from the prison in Atlanta, Texas, is able to

attend prison services only once per month. *Id.* at 30a, 36a.

While the prison allows YEA adherents to meet without an outside volunteer on Mondays to watch video and audio tapes of sermons, the prison will not allow those meetings on the Sabbath. *Id.* at 32a. Muslims, on the other hand, regularly hold Saturday religious meetings without an outside volunteer. When Mr. Adkins asked why Muslims could hold Saturday services while YEA adherents could not, a prison official replied that "we all know what they had to go through to get what they got." *Id.* This apparently referred to a court order permitting Muslims to conduct services without an "accredited religious volunteer." *Id.* at 9a, 35a.

In May 2001, Mr. Adkins filed a pro se lawsuit against respondents in the District Court for the Eastern District of Texas, alleging, among other things, that respondents' refusal to allow him to assemble with other YEA adherents on the Sabbath and holy days violated RLUIPA. *See id.* at 2a ("The gravamen of [Mr. Adkins's] complaint is that he has not been permitted to observe particular days of rest and worship (each Saturday for the Sabbath and a number of specific holy days), which is a requirement of his faith."). Mr. Adkins sought only an injunction permitting him to properly observe the Sabbath and religious holidays, because "he just want[ed] to be allowed to practice his faith." *Id.* at 34a. He chose not to seek monetary damages. *Id.*; *see also id.* at 22a.

District Court Proceedings. The district court referred Mr. Adkins's lawsuit to a magistrate judge. *Id.* at 24a. On August 21, 2002, the magistrate judge filed a report and recommendation (*id.* at 24a-44a) to dismiss Mr. Adkins's RLUIPA claim as a matter of law. *Id.* at 43a. The magistrate judge applied the "substantial burden" test adopted by the Seventh Circuit in *Mack* v. *O'Leary*, 80 F.3d 1175, 1178 (7th Cir. 1996). Under that formulation, "[a] 'substantial burden' is one which forces adherents of a religion to refrain from religiously motivated conduct, inhibits or constrains conduct or expression which manifests a central tenet of a person's

religious beliefs, or compels conduct or expression that is contrary to those beliefs." App. at 40a-41a.

Applying the Seventh Circuit's test, the magistrate judge held that permitting YEA inmates "to gather only once a month for communal worship" is not a substantial burden on the practice of Mr. Akins's religion. *Id.*; *see id.* at 41a-42a. The magistrate judge further observed that other YEA religious ceremonies to be held on particular days (*e.g.*, the Day of Pentecost) should simply be scheduled by YEA faithful for the meeting allowed by respondents "once a month." *Id.* at 42a. The magistrate judge acknowledged that, according to Mr. Adkins's religious beliefs, "failure to assemble for worship on the Holy Days amounted to a 'sin,' for which the penalty is death," but held that the "significance" of the religious practice does not mean that the "curtailment" of that practice "necessarily was a 'significant burden' upon the practice of his religion." *Id.* at 42a n.7.

On November 27, 2002, the district court issued an order adopting the report and recommendation of the magistrate judge and dismissing Mr. Adkins's action. *Id.* at 21a-23a. Mr. Adkins filed a timely pro se appeal in December 2002.

Mr. Adkins's Release from Prison. On October 26, 2003, after the completion of briefing in the court of appeals and after the case had been calendared for decision without oral argument—but before the Fifth Circuit issued its decision in the case—Texas released Mr. Adkins from its prison system on parole, *i.e.*, supervised release subject to numerous conditions. A copy of the "Certificate of Mandatory Supervision" issued by the Texas Department of Criminal Justice, Pardons, and Parole Division is attached as Exhibit 2 to Mr. Adkins's Application for Extension of Time to File Application for Writ of Certiorari (Appl. for Ext. of Time).[2] Mr. Adkins, who was still proceeding pro se at the

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[2] Under the Certificate of Mandatory Supervision (at 1), Mr. Adkins "shall be permitted to be at liberty in the legal custody of the State of Texas but subject to the orders of the [Texas Board of

time, notified the district court that his address had changed on November 8, 2004. *See* Appl. for Ext. of Time, Exh. 3. The district court forwarded this change of address to the Fifth Circuit. Docket Entry 64, *Adkins* v. *Kaspar*, 6:01-cv-00244-JH (Hannah, J.) (E.D. Tex.). However, neither Mr. Adkins nor respondents notified the district court or the Fifth Circuit that his new address stemmed from his parole.

Fifth Circuit Decision. On December 8, 2004—more than a month after Mr. Adkins was released from prison—the Fifth Circuit issued a published decision affirming the dismissal of Mr. Adkins's RLUIPA claim on the merits. App. 1a-20a. The court of appeals held that "[t]he activities alleged to be burdened in this case—YEA Sabbath and holy day gatherings—easily qualify as 'religious exercise' " covered by RLUIPA, and that the key question in this case is therefore "whether the government practice in question places a 'substantial burden' on Adkins's religious exercise." *Id.* at 13a. Accordingly, the court focused its RLUIPA analysis on whether respondents' actions imposed a substantial burden on the exercise of Mr. Adkins's religion.

The court observed that "[w]hat constitutes a 'substantial burden' under the RLUIPA is a question of first impression in this circuit," and acknowledged that "the courts that have assayed it are not in agreement." *Id.* at 13a. After canvassing the various positions adopted by the Seventh, Eighth, Ninth, and Eleventh Circuits on the scope of RLUIPA's "substantial burden" requirement, as well as this Court's pronouncements on the "substantial burden" test in the Free Exercise Clause context, *see id.* at 13a-16a, the court staked out the Fifth Circuit's position on the issue: "[F]or

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Pardons and Paroles] and Texas Department of Criminal Justice Parole Division, and under the rules and conditions of Mandatory Supervision" set forth in the Certificate. The Certificate further provides that, during his parole, Mr. Adkins "remain[s] in the legal custody of the State of Texas subject to the orders of the [Parole] Board and Parole Division." *Id.* at 3.

purposes of applying the RLUIPA in this circuit, a government action or regulation creates a 'substantial burden' on a religious exercise if it truly pressures the adherent to significantly modify his religious behavior and significantly violate his religious beliefs." *Id.* at 16a.

Under that test, no substantial burden may arise from a rule of general applicability. As the Fifth Circuit explained, "a government action or regulation does *not* rise to the level of a substantial burden on religious exercise if it merely prevents the adherent from either enjoying some benefit that is not otherwise generally available or acting in a way that is not otherwise generally allowed." *Id.* at 17a (emphasis added). In addition, the court also stated that "no test for the presence of a 'substantial burden' in the RLUIPA context may require that the religious exercise that is claimed to be thus burdened be central to the adherent's religious belief system." *Id.* Under the Fifth Circuit's test, however, a RLUIPA plaintiff has "the burden of demonstrating the honesty and accuracy of his contention that the religious practice at issue is important to the free exercise of his religion." *Id.*

Applying that test, the Fifth Circuit held that—even though "Adkins was and is prevented from congregating with other YEA members on many Sabbath and YEA holy days," *id.* at 18a—respondents had "not placed a substantial burden on Adkins's free exercise of his YEA religion, within the contemplation of the RLUIPA," *id.* at 19a. In reaching that conclusion, the court focused on the "uniform requirement for all religious assemblies at Coffield *with the exception of Muslims*" to have "an outside observer" present for worship. *Id.* (emphasis added). Thus, because meetings of religious groups without an outside volunteer present are not "generally allowed" at the prison, the court held, there was no "substantial burden" on Mr. Adkins's religious exercise.[3]

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[3] Mr. Adkins pointed to several similarly situated groups who allegedly met regularly without an accredited religious volunteer. *See* Pet. Fifth Circuit Br. at 13-14; Pet. Fifth Circuit Reply Br. at 5.

Fifth Circuit Refusal to Vacate its Decision. The Fifth Circuit's mandate issued on December 30, 2004. Undersigned counsel were thereafter retained to represent Mr. Adkins on a pro bono basis and evaluate Mr. Adkins's options. In doing so, counsel learned that Mr. Adkins had been released from prison on October 26, 2004. Mr. Adkins's release from prison appeared to moot his challenge to the conditions of his confinement under RLUIPA before the Fifth Circuit issued its December 8, 2004 decision. Accordingly, Mr. Adkins's newly retained counsel filed a motion asking the Fifth Circuit to recall the mandate and vacate its decision for apparent lack of jurisdiction. The motion explained that—to the extent that Mr. Adkins's release from prison mooted his RLUIPA claim—vacatur was required under this Court's decisions in *U.S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 513 U.S. 18 (1994), and *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950), as well as circuit case law and other authority.

Respondents opposed Mr. Adkins's motion on the ground that the Fifth Circuit's decision is of the "utmost importance." App. 49a; *see id.* at 47a (characterizing Fifth Circuit decision as an "important decision"); *id.* at 47a-48a ("significant decision"). Respondents explained that, although "the general rule is to vacate the judgment" if a case

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The Fifth Circuit, however, addressed only the Muslim population, which the court characterized as being subject to "a special court order." App. 19a. At a minimum, the record establishes a disputed issue of material fact as to whether members of YEA are subjected to discriminatory treatment under the prison's purportedly "uniform [volunteer] requirement." *Id.*

Moreover, in their merits brief before the Fifth Circuit, respondents did not reference any court order establishing an exemption from the "uniform" rule for Muslim inmates. Instead, they observed that YEA inmates were "members of a minority faith, in contrast to the Muslim inmates," and that the Fifth Circuit allows prisons to provide less accommodation to religions with fewer practitioners. Resp. Fifth Cir. Br. at 5 (filed Sep. 22, 2003) (citing *Ganther* v. *Ingle*, 75 F.3d 207, 211 (5th Cir. 1996)).

becomes moot during appeal, "this doctrine is an equitable one," *id.* at 48a, and that here "the equities favor[] retaining the decision" because of its "importance" to the Texas prison system, *id.* at 49a. Respondents further suggested that the "remedy" in this situation was for Mr. Adkins to "file a petition for certiorari" with this Court. *Id.* at 50a.

On March 10, 2005, the Fifth Circuit issued a per curiam order refusing to vacate its decision. *Id.* at 45a.

REASONS FOR GRANTING THE WRIT

I. THE FIFTH CIRCUIT'S DECISION DEEPENS THE CIRCUIT CONFLICT OVER WHAT CONSTITUTES A "SUBSTANTIAL BURDEN" ON RELIGIOUS EXERCISE UNDER RLUIPA

The "principal purpose" for the exercise of this Court's certiorari jurisdiction "is to resolve conflicts among the United States courts of appeals." *See Braxton* v. *United States*, 500 U.S. 344, 347 (1991); S. Ct. Rule 10(a). As the Fifth Circuit expressly acknowledged, the federal circuits "are not in agreement" on "[w]hat constitutes a 'substantial burden' under RLUIPA." App. 13a. The Fifth Circuit deepened that conflict in this case by rejecting the "substantial burden" tests employed by the Seventh, Eighth, Ninth, and Eleventh Circuits and adding its own—brand new—test to the mix "for purposes of applying the RLUIPA in [the Fifth] Circuit." *Id.* at 16a. RLUIPA's "substantial burden" requirement is the gateway to federal relief from discrimination on the basis of religion, unequal religious accommodations, and unjustified infringement of the free exercise of religion for hundreds of thousands of incarcerated individuals across the United States. A uniform federal standard is needed on that critical civil rights issue.

1. Congress enacted RLUIPA in 2000 in response to a chain of events set in motion by this Court's decision in *Employment Division Department of Human Resources* v. *Smith*, 494 U.S. 872 (1990). In *Smith*, this Court held that

laws that are neutral and generally applicable are not subject to strict scrutiny under the Free Exercise Clause. *Id.* at 879-882. In response to *Smith*, Congress enacted the Religious Freedom Restoration Act (RFRA) of 1993, 42 U.S.C. §§ 2000bb *et seq.* The stated purpose of RFRA was to "restore the compelling interest test as set forth in *Sherbert* v. *Verner* and *Wisconsin* v. *Yoder*" and to apply that test to all government acts, including laws of general applicability, that "substantially burdened" religious exercise. 42 U.S.C. §§ 2000bb-1, 2000bb(b). In *City of Boerne* v. *Flores*, 521 U.S. 507, 536 (1997), however, this Court concluded that RFRA was unconstitutional as applied to state and local governments because it was beyond the scope of Congress's authority under Section 5 of the Fourteenth Amendment.

Congress responded by enacting RLUIPA. In pertinent part, RLUIPA reinstated RFRA's application of strict scrutiny to burdens on religious exercise, but limited the scope of the statute to two specific contexts—land use ordinances and institutionalized persons. Section 3 of RLUIPA, the provision involved in this case, lifts government-imposed burdens on the religious exercise of institutionalized persons. It lays down a "[g]eneral rule" that "[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution," unless that burden "is in furtherance of a compelling governmental interest." *Id.* § 2000cc-1(a)(1). Section 3 further specifies that—notwithstanding the constitutional rule established by *Smith*—the government is prohibited from imposing such a burden "even if the burden results from a rule of general applicability." *Id.* § 2000cc-1(a)(1). Rather than relying on its Section 5 authority in enacting Section 3 of RLUIPA, Congress instead invoked its authority under the Spending Clause and the Commerce Clause. *See* 42 U.S.C. §§ 2000cc-1(b)(1) and (2).[4]

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[4] Before enacting RLUIPA, Congress compiled substantial evidence during three years of hearings establishing that, in the

2. In the four-plus years since RLUIPA was enacted, confusion has plagued the lower courts over the meaning of the Act's "substantial burden" test. That confusion is at least partly attributable to the fact that RLUIPA does not define the term "substantial burden"; questions over the interplay between RLUIPA and RFRA; and uncertainty surrounding this Court's free exercise jurisprudence prior to *Smith* as well as the interrelationship between that jurisprudence and RLUIPA. In any event, regardless of the source of that confusion, the federal circuits—as the Fifth Circuit expressly acknowledged in this case—"are not in agreement" over "[w]hat constitutes a 'substantial burden' under the RLUIPA." App. 13a; *see id.* at 13a-14a (discussing conflict).

a. The Eighth and Third Circuits have concluded that "Congress intended that the language of the act is to be applied just as it was under RFRA." *Murphy* v. *Missouri Dep't of Corrections*, 372 F.3d 979, 987 (8th Cir.), *cert. denied*, 125 S. Ct. 501 (2004); *see DeHart v. Horn*, 390 F.3d 262 (3d Cir. 2004) (concluding that RLUIPA did not enact new substantive standard of review for prisoner religious claims). RFRA's "substantial burden" standard looks to whether the government practices "significantly inhibit or constrain conduct or expression that manifests some *central tenet* of a [person's] individual [religious] beliefs," or "den[ies] a [person] reasonable opportunities to engage in those activities that are *fundamental* to a [person's] religion." *Murphy*, 372 F.3d at 988 (quoting *Weir* v. *Nix*, 114 F.3d 817, 820 (8th Cir. 1997)) (emphasis added). *See also Henderson* v. *Kennedy*, 265 F.3d 1072, 1074 (D.C. Cir. 2001) (RLUIPA did not alter requirement to inquire into importance of

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absence of federal legislation, persons committed to prisons and other state institutions were the brunt of substantial, unwarranted, and discriminatory burdens on religious exercise. *See, e.g.*, H.R. Rep. No. 219, 106th Cong., 1st Sess. 5, 9 (1999); *Joint Statement of Senator Hatch and Senator Kennedy on RLUIPA*, 146 Cong. Rec. S7774 (daily ed. July 27, 2000); U.S. Br., *Cutter* v. *Wilkinson*, No. 03-9877, at 3-4 (discussing evidence).

religious practice), *cert. denied*, 535 U.S. 986 (2002); *Ford* v. *McGinnis*, 352 F.3d 582 (2d Cir. 2003) (examining importance of feast under Islam in determining whether substantial burden was imposed by denying feast). That approach is directly contradicted by RLUIPA, which defines "religious exercise" as "any exercise of religion, *whether or not compelled by, or central to*, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A) (emphasis added).

b. The Fifth, Seventh, Ninth, and Eleventh Circuits, in contrast, have recognized that RLUIPA imposes a different "substantial burden" test than RFRA. For example, the Seventh Circuit rejected its previous RFRA formulation—which was the same as the Eighth Circuit's current "substantial burden" test—and held that it is inapplicable to RLUIPA claims because of the broader definition of "religious exercise" contained in RLUIPA. *Civil Liberties for Urban Believers* v. *City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003), *cert. denied*, 124 S. Ct. 2816 (2004); App.14a. Under the Seventh Circuit's formulation of the "substantial burden" test, the government regulation must "necessarily bear[] direct, primary, and fundamental responsibility for rendering religious exercise * * * *effectively impracticable*." *Id.* at 761 (emphasis added). Both the Fifth Circuit—in this case, App. 16a—and the Eleventh Circuit have rejected that definition. *See Midrash Sephardi, Inc.* v. *Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004) , *cert. denied*, 125 S. Ct. 1295 (2005). By contrast, the Ninth Circuit has followed it. *San Jose Christian College* v. *City of Morgan Hill*, 360 F.3d 1024, 1035 (9th Cir. 2004) (defining "substantial burden" as "a significantly great restriction or onus upon such exercise" and finding definition "entirely consistent" with the Seventh Circuit's "effectively impracticable" standard).[5]

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[5] The Seventh Circuit itself has deviated from that strict version of the "substantial burden" test in certain prison cases. For example, in *Charles* v. *Verhagen*, 348 F.3d 601, 604-605 (7th Cir.

The Eleventh Circuit has adopted a much more relaxed inquiry than the Seventh Circuit's "effectively impracticable" test. In the Eleventh Circuit, a "substantial burden" results "from pressure that tends to force adherents to forego religious precepts or from pressure that mandates religious conduct." *Midrash Sephardi, Inc.*, 366 F.3d at 1227. Under that formulation of the "substantial burden" test, an inmate may satisfy RLUIPA by showing that the government regulation *tends* to force him to forego his religious precepts, as opposed to having to show that the regulation renders religious exercise "effectively impracticable."

c. In this case, the Fifth Circuit considered and rejected the "substantial burden" tests adopted by the Seventh, Eighth, Ninth, and Eleventh Circuits. *See* App. 13a-14a. The Fifth Circuit agreed with the Seventh, Ninth, and Eleventh Circuits—in conflict with the Third and Eighth Circuits—that the RFRA "substantial burden" standard does not apply to RLUIPA, and it held that "no test for the presence of a 'substantial burden' in the RLUIPA context may require that the religious exercise that is claimed to be thus burdened be central to the adherent's religious belief system." *Id.* at 14a, 17a. The Fifth Circuit, however, declined to follow any of the various "substantial burden" tests adopted by the Seventh, Eighth, Ninth, or Eleventh Circuits for RLUIPA claims. Instead, the Fifth Circuit

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2003) the Seventh Circuit affirmed the district court's conclusion that the prison violated RLUIPA by refusing to allow a Muslim prisoner to keep a reasonable quantity of prayer oil in his cell. Likewise, in *Charles* v. *Frank*, 101 Fed. Appx. 634 (7th Cir.), *cert. denied*, 125 S. Ct. 479 (2004), a Muslim inmate protested a prison rule preventing him from wearing prayer beads around his neck. According to the court, the regulation, though generally applicable, imposed a substantial burden on religious exercise (albeit one that the court found to be justified in the inmate's case). *Id.* at 635. *Cf. Sts. Constantine & Helen Greek Orthodox Church, Inc.* v. *City of New Berlin*, 396 F.3d 895, 900 (7th Cir. 2005).

adopted yet another definition of "substantial burden," stating that, "for purposes of applying the RLUIPA in this circuit, a government action or regulation creates a 'substantial burden' on a religious exercise if it truly pressures the adherent to significantly modify his religious behavior and significantly violate his religious beliefs." *Id.* at 16a.

The Fifth Circuit's test adds a new—and fallacious—limitation on RLUIPA's touchstone "substantial burden" requirement. As the court explained, under the Fifth Circuit rule, "a government action or regulation does *not* rise to the level of a substantial burden on religious exercise if it merely prevents the adherent from either enjoying some benefit that is *not otherwise generally available* or acting in a way that is *not otherwise generally allowed*." *Id.* at 17a (emphases added). In other words, in the Fifth Circuit, no substantial burden may arise from a generally applicable government action or regulation. That position directly contravenes the text of RLUIPA, which declares that "[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution * * * *even if the burden results from a rule of general applicability*." 42 U.S.C. § 2000cc-1(a) (emphasis added).

Moreover, the Fifth Circuit's "substantial burden" test effectively—and paradoxically—transforms RLUIPA into a statutory version of *Smith*, in which this Court held that the First Amendment does not protect burdens on religion imposed by laws of general applicability. But the genesis of Section 3 of RLUIPA was Congress's effort to *bolster* the protections afforded by the First Amendment—in the wake of this Court's decision in *Smith*. *See* 42 U.S.C.A. § 2000cc-3(g) ("This chapter shall be construed in favor of a broad protection of religious exercise, to the *maximum extent permitted* by the terms of this chapter and the Constitution.") (emphasis added); *Mayweathers* v. *Newland*, 314 F.3d 1062, 1070 (9th Cir. 2002) (RLUIPA "raises" First Amendment standard), *cert. denied*, 540 U.S. 815 (2003); *Murphy*, 372

F.3d at 986 ("[RLUIPA] established a statutory free exercise claim encompassing a higher standard of review than that which applies to constitutional free exercise claims.").

The Fifth Circuit's "substantial burden" test also conflicts with the decisions of other circuits that have examined whether generally applicable prison rules create a substantial burden on religion. *See, e.g., DeHart*, 390 F.3d at 273 (prisoner requesting exemption from general rule for special diet that conformed with Buddhist religion); *Henderson*, 265 F.3d at 1074 (general prohibition on selling message-bearing T-shirts on National Mall); *Ford*, 352 F.3d at 585 (prohibition on inmates in disciplinary housing receiving Muslim feast); *Pounders* v. *Kempker*, 79 Fed. Appx. 941 (8th Cir. 2003) (denial of sweat lodge to Native American inmates); *see also Figel* v. *Overton*, 121 Fed. Appx. 642 (6th Cir. 2005) (prisoner who sued because officials refused to grant exception to rule requiring publications from "authorized vendor" for books sent to him by the Philadelphia Church of God stated claim under RLUIPA); *Charles* v. *Frank*, 101 Fed. Appx. 634, 635 (7th Cir. 2004) (generally applicable prison rule that prevented Muslim inmate from wearing prayer beads around his neck).

Applying its new test to the facts of this case, the Fifth Circuit held that—even though "Adkins was and is prevented from congregating with other YEA members on many Sabbath and YEA holy days," *id.* at 18a—respondents had "not placed a substantial burden on Adkins's free exercise of his YEA religion, within the contemplation of the RLUIPA," *id.* at 19a. In reaching that conclusion, the court grounded its decision on the "uniform requirement for all religious assemblies at Coffield" to have "an outside volunteer" present for worship. *Id.* Thus, because meetings of religious groups without an outside volunteer present are not "generally allowed" at the prison, the court held that there was no "substantial burden" on Mr. Adkins's religious exercise. That was the end of the matter. The court made no

effort to inquire into the hardship imposed on Mr. Adkins, or whether the application of the prison's rule would cause Mr. Adkins or other YEA adherents to "forego religious precepts." *Midrash Sephardi, Inc.*, 366 F.3d at 1227. Nor did the court seriously consider whether respondents had applied that rule in a discriminatory fashion.[6]

3. The opportunity to exercise religion behind prison walls is of vital importance to thousands of individuals incarcerated in the United States. RLUIPA establishes a fundamental national safeguard against discriminatory practices against religion in the state prison system and thus a potentially critical civil right for inmates. The multi-dimensional—and growing—circuit conflict over RLUIPA's "substantial burden" requirement has created enormous confusion from the standpoint of both prisoners and prison officials over the religious activities that are protected by federal law and has subjected inmates in different circuits to different treatment under federal law. This Court's guidance is needed to resolve that undeniable conflict and confusion.

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[6] The result in this case thus conflicts with the decisions of other courts. The Fifth Circuit held that it was not a "substantial burden" on Mr. Adkins's religion to deny him certain religious days of rest and worship. But the Second Circuit has held that denial of a single religious holiday can constitute a "substantial burden" on religion in violation of RLUIPA. *See, e.g., Shakur* v. *Selsky*, 391 F.3d 106 (2d Cir. 2004) (refusing inmate non-mandatory religious feast was "substantial burden" on religion); *see also Agrawal* v. *Briley*, 2004 WL 1977581, at *6 (N.D. Ill. Aug. 25, 2004); *Wilson* v. *Moore*, 2002 WL 950062 (N.D. Fla. Feb. 28, 2002) (refusing to dismiss RLUIPA claims based on, *inter alia*, inability to meet weekly without an outside volunteer).

II. CERTIORARI IS WARRANTED TO DETERMINE WHETHER THE FIFTH CIRCUIT'S DECISION MUST BE VACATED DUE TO MR. ADKINS'S RELEASE FROM PRISON

The first question presented meets all the customary criteria for certiorari. This case, however, presents an even more fundamental question concerning the operation of the federal judicial system that also merits this Court's review. As explained above, although Mr. Adkins was released from prison on parole before the Fifth Circuit decided his case (and remains on supervised release), the Fifth Circuit declined to vacate its decision in this case for mootness. That ruling directly conflicts with the decisions of this Court and of other circuits, not to mention the "established practice" of this Court. *Munsingwear*, 340 U.S. at 39.

1. As explained, Mr. Adkins was released from prison on parole (*i.e.*, supervised release) more than a month before the Fifth Circuit issued its decision in this case. Counsel filed a motion advising the court of appeals that Mr. Adkins had been released from prison by the date of its decision and requesting that the court vacate its decision for apparent lack of jurisdiction. The court denied that motion in a per curiam order. App. 45a. There are only two plausible explanations for the court's order: (1) either the Fifth Circuit determined that Mr. Adkins's case was not moot, or (2) the court accepted respondents' central contention that the Fifth Circuit's decision in this case was simply too "important" to vacate. Either way, the Fifth Circuit's ruling refusing to vacate its decision squarely conflicts with the decisions of this Court and of other circuit courts, and therefore provides an independent basis for this Court's review.

2. Under the settled rule—which is grounded in Article III's "case or controversy" requirement—"a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell* v. *McCormack*, 395 U.S. 486, 496, (1969); *see also Church of*

Scientology of Cal. v. *United States*, 506 U.S. 9, 12 (1992) (a claim is moot when "an event occurs while a case is pending on appeal that makes it impossible for the court to grant 'any effectual relief whatever' ") (quoting *Mills* v. *Green*, 159 U.S. 651, 653 (1895)). Applying that rule, courts have held that when, as here, an inmate sues only for equitable relief challenging his conditions of confinement, the lawsuit becomes moot if the inmate is released from prison. *See, e.g., IAL Aircraft Holding, Inc.* v. *FAA*, 216 F.3d 1304, 1306 (11th Cir. 2000); *McAlpine* v. *Thompson*, 187 F.3d 1213, 1218 (10th Cir. 1999); *Gillespie* v. *Crawford*, 858 F.2d 1101, 1103 (5th Cir. 1988) (en banc) (per curiam).[7]

The only conceivable basis for concluding that Mr. Adkins's release from prison did not moot his RLUIPA claim is his parole status. Mr. Adkins was released on "supervised release" subject to numerous conditions and, under the terms of his Certificate of Mandatory Supervision, his parole may be revoked for violation of those conditions. *See* Certificate of Mandatory Supervision, *supra*, at 3. During his parole, Mr. Adkins "remain[s] in the legal custody of the State of Texas subject to the orders of the [Parole] Board and Parole Division." *Id.* Courts have reached different conclusions as to whether an inmate's parole or other conditional release is sufficient to avoid a mootness challenge to a conditions-of-confinement claim. *Compare McAlpine*, 187 F.3d at 1215; *United States* v. *Johnson*, 23 Fed. Appx. 832, 833 (9th Cir. 2001) *with Morales* v. *Schmidt*, 489 F.2d 1335, 1336 (7th Cir. 1973) (suggesting that prisoner's challenge of his prison conditions might not be moot even after his release from

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[7] Other courts have concluded likewise in similar circumstances. *Abdul-Akbar* v. *Watson*, 4 F.3d 195, 206-207 (3d Cir. 1993) (unconditional release); *Martin* v. *Sargent*, 780 F.2d 1334, 1337 (8th Cir. 1985) (transfer). *But see Rosales-Garcia* v. *Holland*, 238 F.3d 704, 713 (6th Cir.) (holding that a challenge to an INS detention is not moot where detainee is released but required to remain in a supervised release program), *vacated on other grounds*, *Thomas* v. *Rosales-Garcia*, 534 U.S. 1063 (2001).

prison because "there is always the possibility that [the prisoner] during his period of parole will violate the terms of his conditional release and thus be returned to prison"); *Micklus* v. *Carlson*, 632 F.2d 227, 232-233 (3d Cir. 1980) (finding that because youth offender could be recommitted if Parole Commission determined he would benefit from recommittal, parole did not moot claim for equitable relief).

To the extent that the Fifth Circuit held that Mr. Adkins's RLUIPA claim was not moot because of his continuing parole status during the appeal, then the court's ruling conflicts with the decisions of other circuits. This Court should review and resolve the question whether, or in what circumstances, an inmate's supervised release from prison on parole moots an equitable challenge to prison conditions. Moreover, to be clear, to the extent that Mr. Adkins's conditional release from prison did not moot his RLUIPA claim, he continues to press that claim and to seek relief from the judgment below. Mr. Adkins has an interest in ensuring that, if he is found to have violated the terms of his release, he is not returned to a prison environment in which—under the Fifth Circuit's decision in this case—prison officials are free to discriminate against his religious practices by hiding behind the veil of "generally applicable" rules.

3. The other and perhaps more likely basis for the Fifth Circuit's ruling denying Mr. Adkins's motion to vacate the decision below is that the court agreed with respondents' contention that the decision was too important to vacate.

As discussed above, respondents opposed Mr. Adkins's motion on the ground that the Fifth Circuit's decision is of the "utmost importance." App. 49a. Respondents explained that, although "the general rule is to vacate the judgment" if a case becomes moot during appeal, "[t]his doctrine is an equitable one." *Id.* at 48a. And respondents argued that, in this case, "the equities favor[] retaining the decision" in light of its "importance" to the Texas prison system. *Id.* at 49a. In support of that contention, respondents declared:

> Until this decision was issued, there were no guidelines in this circuit detailing the analysis to use in claims brought under the RLUIPA. *A decision declaring and clarifying the law is of utmost importance* and, in light of the complete absence of case law interpreting the RLUIPA in this circuit, *it would not be prudent to withdraw the opinion.*

Id. at 49a (emphasis added).

To the extent that the Fifth Circuit embraced that argument, its ruling directly conflicts with this Court's decisions. As this Court recognized in its seminal *Munsingwear* decision, the "established practice * * * in dealing with a civil case from a court in the federal system which has become moot [during the appeal] * * * is to reverse or vacate the judgment below and remand with a direction to dismiss." 340 U.S. at 39. Indeed, the Court described that time-honored practice as "the duty of the appellate court." *Id.* at 40 (quoting *Duke Power Co.* v. *Greenwood County*, 299 U.S. 259, 267 (1936)). The Court recently reaffirmed that practice in *U.S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 513 U.S. 18, 25 (1994). In *Bonner Mall*, the Court held "that mootness by reason of *settlement* does not justify vacatur of a judgment under review." *Id.* at 29 (emphasis added). The Court reiterated, however, that vacatur remains the only appropriate action "where a controversy presented for review has 'become moot due to circumstances unattributable to any of the parties.' " *Id.* at 23 (quoting *Karcher* v. *May*, 484 U.S. 72, 83 (1987)). In addition, the Court emphasized that, when the losing party cannot appeal the opinion due to "the vagaries of circumstance," he "ought not in fairness be forced to acquiesce in the judgment." *Id.* at 25. Mr. Adkins did not release himself from prison, and thus this Court's precedents strongly counseled the Fifth Circuit to vacate its opinion.

Furthermore, this Court has emphatically rejected the notion that the federal courts ought to adopt "a practice of deciding questions of importance even though the case has

become moot." *See Amalgamated Ass'n of Street, Elec., Ry. & Motor Coach Employees* v. *Wisconsin Employment Relations Bd.*, 340 U.S. 416, 418 (1951). In *Amalgamated Association*, the Court declined the invitation of the parties to follow the "importance" exception to the mootness doctrine adopted by the Wisconsin courts. As the Court explained, "whatever the practice in Wisconsin courts, 'A federal court is without power to decide moot questions or to give advisory opinions which cannot affect the rights of the litigants before it.' " *Id.* (citing *United States* v. *Alaska S.S. Co.*, 253 U.S. 113, 115 (1920)); *see also Local No. 8-6, Oil, Chem. & Atomic Workers Int'l Union* v. *Missouri*, 361 U.S. 363 (1960). To the extent that it adopted respondents' position, the Fifth Circuit's ruling in this case denying Mr. Adkins's motion to vacate flatly contradicts that precedent. [8]

In addition, the Fifth Circuit's action conflicts with the decisions of other circuits. As the Tenth Circuit stated in *Jones* v. *Temmer*, 57 F.3d 921, 923 n.1 (10th Cir. 1995):

> We * * * reject out of hand defendants' argument that vacatur should be denied because of an asserted "governmental interest" in having the lower court

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[8] In *Friends of the Earth, Inc.* v. *Laidlaw Env'tl Servs.*, 528 U.S. 167, 191-192 (2000), this Court observed that "[t]o abandon the case at an advanced stage [due to mootness] may prove more wasteful than frugal." Some have pointed to *Laidlaw* and argued that "the Supreme Court is moving toward the prudential mootness doctrine advocated by Chief Justice Rehnquist in his concurrence in *Honig* v. *Doe*, [484 U.S. 305, 329-332 (1988)]." *Gator.com Corp. v. L.L. Bean, Inc.*, 398 F.3d 1125, 1141 (9th Cir. 2005) (en banc) (Fletcher, J., joined by Graber and Paez, JJ., dissenting). This Court itself has not abandoned the enduring principles underlying cases such as *Bonner Mall*, *Munsingwear*, and *Amalgamated Association*. But to the extent that *Laidlaw* creates any doubt on this score, it only heightens the need for review in this case to clarify the Court's position on this fundamental and recurring question of federal jurisdiction and practice.

> opinion available as precedent. The Supreme Court has never indicated that such an interest is a factor to be considered in the treatment of moot cases.

See also Murray v. *Silberstein*, 882 F.2d 61 (3d Cir. 1989) (vacating decision as moot despite its asserted importance).[9]

The fact that the Court's decision in this case—issued without the benefit of oral argument—decides an important federal question on which the circuits are divided only heightens the need for following the customary vacatur practice here. *Cf. Clarke* v. *United States*, 915 F.2d 699, 708 (D.C. Cir. 1990) ("Vacatur appears particularly appropriate where retention of the precedent creates a gratuitous conflict with a co-equal branch of government."). Indeed, one of the reasons that this Court utilizes its vacatur practice is "to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences." *Munsingwear*, 340 U.S. at 40-41. That consideration is particularly appropriate in this case in view of the circuit conflict over RLUIPA's "substantial burden" test and the fact that the rule adopted by the Fifth Circuit directly contravenes RLUIPA itself.

Nor does it serve the interests of this Court to condone a practice whereby the lower courts improperly refuse to vacate their own decisions due to mootness at the urging of the prevailing party, leaving certiorari as the only avenue of vacating a moot decision. In opposing Mr. Adkins's motion to vacate, respondents suggested to the court of appeals that the "remedy" in this situation was for Mr. Adkins to "file a petition for certiorari" with this Court. App. at 50a. A

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[9] Furthermore, Mr. Adkins was paroled *before* the Fifth Circuit decided his case. If the "case or controversy" required by Article III ceased to exist before the Fifth Circuit issued its decision, then that court lacked jurisdiction to enter a judgment. *IAL Aircraft Holding, Inc*, 216 F.3d at 1307 (concluding that jurisdiction ceased "the moment the alleged mooting event occurred"); *Humphreys* v. *DEA*, 105 F.3d 112, 115 (3d Cir. 1996) (choosing not to vacate decision because at "the time [the] decision was filed, there was indisputably a live controversy between the parties").

litigant might believe that—if they can succeed in convincing a lower court that its decision is too important to vacate for mootness—there is "safety in numbers" in this Court's certiorari docket. This Court should deter any such litigation strategy on the part of parties seeking to preserve favorable decisions that have been mooted by happenstance.

Accordingly, even if the Court concludes that plenary review is not warranted on the "substantial burden" question, this Court should grant the petition and consider whether the Fifth Circuit properly declined to vacate its decision after it was informed that Mr. Adkins had been released.[10]

CONCLUSION

For the foregoing reasons, the petition should be granted and the judgment below reversed or, at a minimum, vacated.

Respectfully submitted,

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[10] If the Court concludes that this case is moot and that plenary review is not warranted, the Court should grant the petition, vacate the Fifth Circuit's decision, and remand with instructions to dismiss Mr. Adkins's complaint without prejudice. *See Munsingwear*, 340 U.S. at 39-41; 28 U.S.C. § 2106.

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 03-40028

DONALD M. ADKINS,

Plaintiff-Appellant,

v.

DON KASPAR, CHAPLAINCY DEPARTMENT;
ROY A. GARCIA, WARDEN, COFFIELD UNIT;
MICHAEL W. SIZEMORE, ASSISTANT WARDEN,
COFFIELD UNIT; KENNETH M. REYNOLDS,
CHAPLAIN, COFFIELD UNIT;
LARRY HART, ASSISTANT CHAPLAIN, COFFIELD
UNIT;
KEVIN MOORE, SENIOR WARDEN, COFFIELD UNIT;
LEONARD SANCHEZ, SENIOR CHAPLAIN,
COFFIELD UNIT,

Defendants-Appellees,

DECIDED: Dec. 8, 2004.

Before GARWOOD, WIENER, and DeMOSS, Circuit Judges.

WIENER, Circuit Judge:

Plaintiff-Appellant Donald M. Adkins, a Texas state prisoner incarcerated at all relevant times in the Coffield Unit ("Coffield") and proceeding *pro se*, filed suit in district court alleging violation of his First and Fourteenth amendment rights, as well as violation of the Religious Land Use and Institutionalized Persons Act ("RLUIPA").[1] Made defendants were Don Kaspar of the Chaplaincy Department of the Texas Department of Criminal Justice ("TDCJ") and the following Coffield personnel: Roy A. Garcia, Michael Sizemore, Kenneth Reynolds, Larry Hart, Kevin Moore, and Leonard Sanchez (collectively, "defendants"). Following a *Flowers*[2] hearing, the magistrate judge made findings of fact and conclusions of law, and recommended dismissing Adkins's action with prejudice. The district court adopted the magistrate judge's recommendation and dismissed the suit. Adkins advances four claims on appeal: (1) The district court erred in concluding that there was no violation of his First Amendment right to free exercise of his religion; (2) the district court erred in concluding that he suffered no Equal Protection violation; (3) defendants' actions violated the RLUIPA's prohibition of substantially burdening religious exercise without specifying a compelling governmental interest and a narrowly tailored solution; and (4) the magistrate judge's denial of Adkins's witness subpoena requests was an abuse of discretion. We affirm.

I. FACTS AND PROCEEDINGS

Adkins is a member of the Yahweh Evangelical Assembly ("YEA"). The gravamen of his complaint is that he has not been permitted to observe particular days of rest and worship (each Saturday for the Sabbath and a number of specific holy days), which is a requirement of his faith. The case was

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[1] 42 U.S.C. § 2000cc *et seq.*

[2] *Flowers* v. *Phelps*, 956 F.2d 488 (5th Cir.), *vacated and superceded in part on denial of reh'g*, 964 F.2d 400 (5th Cir.1992).

referred to a magistrate judge, who conducted an evidentiary hearing consistent with *Flowers*. Adkins's witnesses at the *Flowers* hearing included (1) Jerry Healan, a YEA elder who went to Coffield once a month to preside over observance of the Sabbath, (2) David and Nancy McEnany, who work with YEA inmates in the Oklahoma prison system and trained to be YEA volunteers at Coffield, and (3) Adkins himself.[3] Defendant Sanchez, the Senior Chaplain at Coffield, was the only witness for the defendants.

Healan testified that the YEA requires its adherents to meet together on every Sabbath and to congregate and make particular observations on specific holy days. He further testified that he has been permitted to go to Coffield and hold a baptismal service for Adkins and other inmates, and that, following volunteer training, he has gone to Coffield once a month to oversee Sabbath observances. Healan estimated that approximately 25 to 30 Coffield inmates regularly attend these meetings. Healan stated that he is unable to attend more often because of the distance he must travel to and from Coffield, and the travel time's effect on his other religious and personal obligations. Healan also testified that he and Adkins correspond regularly and that he sends religious materials to Adkins in prison. Healan stated that Adkins has a solid understanding of YEA beliefs, and has authored several articles that were published in newsletters and on the Internet.

The McEnanys testified that they went through the Coffield religious volunteer program so that they could attend and oversee Sabbaths at Coffield. At the time of the *Flowers* hearing, however, neither of them had been cleared by prison officials to lead meetings on their own.

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[3] Adkins also called Thomas Hobbs as a witness. As his testimony is irrelevant to any issue in this case, we have not included it in this recitation of facts.

Adkins acknowledged he has been granted "lay-ins" for holy days and the Sabbath, but testified that he and other YEA members had been denied the right to assemble and hold services on their own. He also acknowledged that he and other YEA members had been allowed to attend tape sessions and listen to tapes sent by Healan, but that they are only allowed to do this on Mondays. Adkins averred that he was told that the tape sessions cannot be held on Saturdays unless an accredited religious volunteer is present.

Sanchez testified in response that YEA members are allowed to congregate on the Sabbath when Healan is present at Coffield, and that if Healan were able to attend more frequently on Sabbaths and holy days, arrangements would be made for the YEA members to congregate, conditioned only on availability of space and time. Sanchez confirmed that thus far the McEnanys had not been allowed to lead YEA services at Coffield without the supervision of Healan because of a concern that "some things that were going on" were "inmate driven." Sanchez added, however, that if the McEnanys would attend several more sessions with Healan, they would be accredited to lead YEA services on their own. Sanchez also testified that there are some 3200 inmates at Coffield and approximately 150 recognized faith groups in the prison system.

The magistrate judge concluded that the defendants had not denied Adkins a reasonable opportunity to exercise his religion. Applying the definition of "substantial burden" enunciated by the Seventh Circuit in *Mack* v. *O'Leary*,[4] the magistrate judge concluded that the defendants had not burdened Adkins's religious exercise in violation of the RLUIPA. The magistrate judge recommended dismissal of Adkins's action; and, after considering the record, the

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[4] 80 F.3d 1175 (7th Cir. 1996).

magistrate judge's recommendations, and the objections raised by Adkins, the district court dismissed the case.

II. ANALYSIS

A. STANDARD OF REVIEW

An evidentiary hearing consistent with *Flowers* v. *Phelps*[5] "amounts to a bench trial replete with credibility determinations and findings of fact."[6] A district court's legal conclusions at a bench trial are reviewed *de novo* and its findings of fact are reviewed for clear error.[7]

B. FREE EXERCISE CLAIM

Adkins's original complaint alleged that defendants non-compliance with the TDCJ's religious accommodation policy impinged on the free exercise of his faith. Citing *Turner* v. *Safley*,[8] Adkins argues on appeal that defendants' violations of the TDCJ policy are not the basis of his First Amendment claim, just evidence to be considered in evaluating it. Our review of the district court's factual findings regarding defendants' compliance with the TDCJ policy reveals no clear error. Adkins's only viable free exercise claim lies in his challenge to the constitutionality of the TDCJ policy.

Turner established a four-factor "rational relationship" test for analyzing the constitutionality of regulations that burden a prisoner's fundamental rights.[9] Under *Turner*'s test, courts

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5 956 F.2d 488 (5th Cir.), *vacated and superseded in part on denial of reh'g*, 964 F.2d 400 (5th Cir.1992).

6 *McAfee* v. *Martin*, 63 F.3d 436, 437 (5th Cir.1995).

7 *Westchester Fire Ins. Co.* v. *Haspel-Kansas Inv. P'ship*, 342 F.3d 416, 418 (5th Cir.2003).

8 482 U.S. 78 (1987).

9 *Id.*

must consider (1) whether a "valid, rational connection [exists] between the prison regulation and the legitimate governmental interest put forward to justify it," (2) whether there exist "alternative means of exercising the fundamental right that remain open to prison inmates," (3) what "impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally," and (4) whether there is an "absence of ready alternatives" to the regulation in question.[10]

We recently upheld the constitutionality of the TDCJ's religious accommodation policy in *Freeman* v. *Texas Department of Criminal Justice*.[11] In that case inmates filed a class action suit alleging that the TDCJ failed to provide them adequate opportunity to practice their faith, in violation of the First and Fourteenth Amendments. Applying *Turner*, we affirmed the district court's grant of those defendants' motion for summary judgment to dismiss the inmates' case. Like the inmates in *Freeman*, Adkins seeks a permanent injunction requiring the TDCJ to make provisions for additional YEA services.

In *Freeman*, we held that the TDCJ's religious accommodation policy is rationally related to legitimate government objectives, the first and "paramount inquiry under *Turner*."[12] Addressing the second prong of the *Turner* test—whether "alternative means" of exercising the group's religious beliefs exist—Adkins argues, and the record reflects, that he and the other YEA members were not permitted to assemble on every Sabbath day and on particular holy days because no volunteer deemed acceptable

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[10] *Id.* at 89-90.

[11] 369 F.3d 854 (5th Cir.2004).

[12] *Id.* at 861. Specifically, that staff and space limitations, as well as financial burdens, are valid penological interests. *Id.* (citing *Ganther* v. *Ingle*, 75 F.3d 207, 211 (5th Cir.1996)).

by defendants was available to supervise the meetings. In analyzing the availability to inmates of "alternative means" of exercising their religion, however, "[t]he pertinent question is not whether the inmates have been denied specific religious accommodations, but whether, more broadly, the prison affords the inmates opportunities to exercise their faith."[13] The magistrate judge found, and the record confirms, that (1) Adkins had access to religious materials; (2) he and other YEA inmates were not required to work on the Sabbath; (3) video and audio tapes were made available on Mondays to all YEA members; and (4) YEA members were permitted to hold and attend live services when Healan was able to attend. These supplemental services, materials and other accommodations furnish Adkins and the YEA members with "alternative means" of exercising their religion.[14]

Adkins contends that the tape sessions were no longer allowed following the filing of this suit. Contrary to this, though, the magistrate judge's findings, which the district court adopted, state that the tapes are still made available for viewing. The current status of the tape sessions is not absolutely clear from the record, but on appeal we look for clear error only, and we find none here. In addition, Sanchez stated at the *Flowers* hearing that if Healan comes to the prison more frequently, additional Sabbath meetings will be accommodated.

We do find some source for concern in the prison's rejection of the McEnanys as volunteers. According to affidavits filed in the district court, the McEnanys were

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[13] *Id.*

[14] *See O'Lone* v. *Estate of Shabazz*, 482 U.S. 342 (1987) (upholding a regulation that prohibited Muslim prisoners from attending Friday afternoon services, the Court found the ability to participate in other Muslim religious ceremonies satisfied *Turner*'s "alternative means" test).

certified by the official volunteer training program and are currently allowed to conduct Sabbath meetings in the Oklahoma prison system. Although Sanchez, in his testimony at the hearing, expressed concern that some occurrences involving the McEnanys were "inmate driven," he did indicate that if the McEnanys attend several sessions at which Healan is present so that they "can get their feet on the ground," they will be allowed to conduct YEA services on their own.

Third, we must consider the impact of granting Adkins injunctive relief on "guards and other inmates, and on the allocation of prison resources generally." The 20 to 25 active members of YEA constitute less than one percent of the large inmate population at Coffield. Requiring the defendants to accommodate every religious holiday and requirement of the YEA, regardless of the availability of volunteers, space, or time, could "spawn a cottage industry of litigation and could have a negative impact on prison staff, inmates and prison resources."[15] Moreover, if Adkins were accommodated and other similarly situated small religious groups were not, the YEA could appear to be favored over the others, a perception that could have a negative effect on prison morale and discipline.[16]

Finally, "no obvious, easy alternatives would accommodate both" Adkins and the TDCJ's administrative needs.[17] Adkins's request that defendants allow the YEA members to assemble on each of their holy days and every Sabbath, regardless of the availability of qualified volunteers

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[15] *Freeman*, 369 F.3d at 862; *see also Turner*, 482 U.S. at 90 ("When accommodation of an asserted right will have a significant 'ripple effect' on fellow inmates or on prison staff, courts should be particularly deferential to the informed discretion of corrections officials.").

[16] *See Kahey* v. *Jones*, 836 F.2d 948, 951 (5th Cir.1988).

[17] *Freeman*, 369 F.3d at 862.

and adequate space and security, is not an "alternative that fully accommodates the prisoner's rights at *de minimis* cost to valid penological interests."[18] Chaplain Sanchez testified that the YEA would be allowed to meet on every Sabbath that Healan or another qualified volunteer is present, as well as on YEA holy days, if space and time are available. In light of the foregoing facts and considerations, we affirm the district court's dismissal of Adkins's First Amendment free-exercise claim.

C. EQUAL PROTECTION CLAIM

Although it is not entirely clear from Adkins's complaint or the briefs, he appears to contend that defendants violated his Fourteenth Amendment equal protection guarantee by favoring adherents of other religions over him and the members of the YEA. To succeed on his Equal Protection claim, Adkins "must prove purposeful discrimination resulting in a discriminatory effect among persons similarly situated."[19] "However, the Fourteenth Amendment does not demand 'that every religious sect or group within a prison—however few in numbers—must have identical facilities or personnel.' "[20] We have held that *Turner* applies to equal protection claims.[21]

Adkins has failed to provide anything more than bald, unsupported, conclusional allegations that defendants purposefully discriminated against him. To hold meetings at Coffield, every religious group (with the exception of the Muslims whose situation is governed by a separate court

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[18] *Turner*, 482 U.S. at 91.

[19] *Muhammad* v. *Lynaugh*, 966 F.2d 901, 903 (5th Cir.1992) (*citing McCleskey* v. *Kemp*, 481 U.S. 279 (1987)).

[20] *Freeman*, 369 F.3d at 862-63 (*quoting Cruz* v. *Beto*, 405 U.S. 319, 322 n.2 (1972)).

[21] *See id.* at 863.

order) is required to have outside volunteers present. The one concern raised by the evidence is that volunteers for the YEA are not being permitted to lead meetings following training but that volunteers for other similarly situated religious groups are allowed to participate. Sanchez expressed a rationale for the delay in allowing the McEnanys to lead meetings on their own, however, and stated that they would be allowed to lead services alone after attending several meetings with Healan. We affirm the dismissal of Adkins's equal protection claim.

D. RLUIPA CLAIM

Adkins insists that his inability to assemble on every Sabbath and every YEA holy day "substantially burdens" the practice of his religion, in violation of the RLUIPA. The RLUIPA was adopted by Congress in response to the Supreme Court's decisions in *Employment Division, Department of Human Resources* v. *Smith*[22] and *City of Boerne* v. *Flores*.[23] Prior to *Smith*, the Supreme Court had employed a "compelling state interest" standard for testing the constitutional validity of laws of general applicability that affect religious practices.[24] Government actions that substantially burdened a religious practice had to be justified by a compelling governmental interest.[25] In *Smith*, the Court

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22 494 U.S. 872 (1990).

23 521 U.S. 507 (1997).

24 *See Sherbert* v. *Verner*, 374 U.S. 398 (1963); *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972).

25 *Sherbert*, 374 U.S. at 402-403. Although *Sherbert* established the general test for free exercise challenges, the Court distinguished the prison context in *Turner* and *O'Lone* v. *Estate of Shabazz*, 482 U.S. 342 (1987). *Turner* and *O'Lone* recognized that, although inmates retain their free exercise rights, incarceration necessarily limits them. *See O'Lone*, 482 U.S. at 348. The burden on the government to defend its actions is substantially less demanding when the *prima facie* constitutional claim has been made by a prisoner challenging prison

changed course when it ruled that laws of general applicability that only incidentally burden religious conduct do not offend the First Amendment.[26] Congress sought to reinstate the pre-*Smith* standard by enacting the Religious Freedom Restoration Act ("RFRA").[27] In *City of Boerne*, however, the Supreme Court invalidated the RFRA as it applied to states and localities, holding that the statute exceeded Congress's remedial powers under Section 5 of the Fourteenth Amendment.[28] Congress responded to *City of Boerne* by enacting the RLUIPA in September 2000. The RLUIPA is largely a reprisal of the provisions of the RFRA, but its scope is limited to laws and regulations that govern (1) land use and (2) institutions such as prisons that receive federal funds.[29]

As always, we begin our review with the language of the statute.[30] The relevant section of the RLUIPA states:

> (a) General rule
>
> No government shall impose a *substantial burden* on the religious exercise of a person residing in or confined to an institution * * * even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person—
>
> (1) is in furtherance of a compelling governmental interest; and

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policy, compared to similar claims outside the prison context. *See id.* at 349.

[26] *See* 494 U.S. at 884-85.

[27] 42 U.S.C. §§ 2000bb, *et seq.*

[28] *See* 521 U.S. at 532-36.

[29] *See* 42 U.S.C. §§ 2000cc, *et seq.*

[30] *Coserv Ltd. Liability Corp.* v. *Southwestern Bell Telephone Co.*, 350 F.3d 482, 486 (5th Cir.2003).

(2) is the least restrictive means of furthering that compelling governmental interest.[31]

Initially, it falls to the plaintiff to demonstrate that the government practice complained of imposes a "substantial burden" on his religious exercise.[32] This requires the court to answer two questions: (1) is the burdened activity "religious exercise," and if so (2) is the burden "substantial"?

The RLUIPA defines "religious exercise" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[33] This broad definition evinces Congress's intent to expand the concept of religious exercise that was used by courts in identifying "exercise of religion" in RFRA cases.[34] The activities alleged to be

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[31] 42 U.S.C. § 2000cc-1 (emphasis added). The section only applies when "the substantial burden is imposed in a program or activity that receives Federal financial assistance" or "the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes." *Id.* In his amended complaint, Adkins alleged that the TDCJ accepts federal funds. As defendants have not challenged this assertion, we proceed under the assumption that the TDCJ does accept federal funds.

[32] The plaintiff has the burden of persuasion on whether the challenged government practice substantially burdens the plaintiff's exercise of religion. Once the plaintiff establishes this, the government bears the burden of persuasion that application of its substantially burdensome practice is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest. *See* 42 U.S.C. § 2000cc-2; 146 Cong. Rec. S7776 (July 27, 2000).

[33] 42 U.S.C. § 2000cc-5(7).

[34] Under the RFRA, many courts required the religious exercise burdened to be "central" to the religion. *See, e.g., Weir* v. *Nix*, 114 F.3d 817, 820 (8th Cir.1997); *Abdur-Rahman* v. *Mich. Dept. of Corrections*, 65 F.3d 489, 492 (6th Cir. 1995); *Werner* v. *McCotter*, 49 F.3d 1476, 1480 (10th Cir. 1995); *Bryant* v. *Gomez*, 46 F.3d 948, 949 (9th Cir.1995). The RFRA was amended by the RLUIPA's enacting legislation to incorporate the same definition for "exercise of religion" as "religious exercise" under the RLUIPA. 42 U.S.C. § 2000bb-2, as amended by

burdened in this case—YEA Sabbath and holy day gatherings—easily qualify as "religious exercise" under the RLUIPA's generous definition, requiring that we answer the second question, whether the government practice in question places a "substantial burden" on Adkins's religious exercise.

What constitutes a "substantial burden" under the RLUIPA is a question of first impression in this circuit.[35] The RLUIPA does not contain a definition of "substantial burden," and the courts that have assayed it are not in agreement. Despite the RLUIPA's eschewing the requirement of centrality in the definition of religious exercise,[36] the Eighth Circuit adopted the same definition that it had employed in RFRA cases, requiring the burdensome practice to affect a "central tenet" or fundamental aspect of the religious belief.[37] The Seventh

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Religious Land Use and Institutionalized Persons Act of 2000, Pub.L. No. 106-274, § 7, 114 Stat. 803 (2000). Prior to amendment, the RFRA defined "exercise of religion" as "the exercise of religion under the First Amendment to the Constitution."

[35] In *Diaz* v. *Collins*, we considered whether a substantial burden was placed on a prisoner's Native American religious exercise in violation of the RFRA. 114 F.3d 69 (5th Cir.1997). Without defining the term, we concluded that circumscribing the use of a medicine bag and headband did not rise to the level of a "substantial burden" but grooming regulations did work a substantial hardship on the prisoner's Native American religious practice. *Id.* at 72-73. Although we did not define "substantial burden," in reaching our conclusions we cited to the Tenth Circuit definition enunciated in *Werner*, 49 F.3d at 1480.

[36] *See* text accompanying n.33 *supra*.

[37] *See Murphy* v. *Missouri Dept. Of Corr.*, 372 F.3d 979, 988 (8th Cir.) *cert. denied*, 73 U.S.L.W. 3297 (U.S. Nov. 15, 2004) (No. 04- 6293) ("To constitute a substantial burden, the government policy or actions: must 'significantly inhibit or constrain conduct or expression that manifests some central tenet of a [person's] individual [religious] beliefs; must meaningful curtail a [person's] ability to express adherence to his or her faith; or must deny a [person] reasonable opportunities to engage in

Circuit, in contrast, abandoned the definition of "substantial burden" that it had used in RFRA cases, holding instead that, "in the context of the RLUIPA's broad definition of religious exercise, a * * * regulation that imposes a substantial burden on religious exercise is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise * * * effectively impracticable."[38] Neither did the Ninth Circuit retain the definition of "substantial burden" that it had employed in RFRA cases, which required interference with a central religious tenet or belief. Turning to *Black's Law Dictionary* and *Merriam-Webster's Collegiate Dictionary*, the Ninth Circuit defined a "substantial burden" as one that imposes "a significantly great restriction or onus upon such exercise."[39] The most recent appellate interpretation of the term under the RLUIPA is that of the Eleventh Circuit, which declined to adopt the Seventh Circuit's definition, holding instead that a "substantial burden" is one that results "from pressure that tends to force adherents to forego religious precepts or from pressure that mandates religious conduct."[40]

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those activities that are fundamental to a [person's] religion.' "); *see also* *Henderson* v. *Kennedy*, 265 F.3d 1072, 1074 (D.C.Cir.2001) (denying a petition for rehearing in a suit under the still valid portion of the RFRA, the court stated that the amendments to the definition of "religious exercise" did not alter the propriety of inquiring into the importance of a religious practice when assessing whether a substantial burden exists).

[38] *Civil Liberties for Urban Believers* v. *City of Chicago*, 342 F.3d 752, 761 (7th Cir.2003), *cert. denied*, -- U.S. --, 124 S.Ct. 2816 (2004) (abandoning the definition in *Mack* v. *O'Leary*, 80 F.3d 1175 (7th Cir.1996)).

[39] *San Jose Christian Coll.* v. *City of Morgan Hill*, 360 F.3d 1024, 1034 (9th Cir.2004) (not following the definition in *Bryant* v. *Gomez*, 46 F.3d 948, 949 (9th Cir.1995)).

[40] *Midrash Sephardi, Inc.* v. *Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir.2004), *petition for cert. filed*, 73 U.S.L.W. 5238 (U.S. Oct. 1, 2004) (No. 04-469).

· The RLUIPA's legislative history, although sparse, affords some guidance: "[Substantial burden] as used in the Act should be interpreted by reference to Supreme Court jurisprudence."[41] And, indeed, on several occasions, the Court has articulated a definition of "substantial burden."

The plaintiff in *Sherbert* v. *Verner* was denied unemployment compensation benefits following the termination of her employment for refusing to work on Saturday, her Sabbath, coupled with her refusal to accept other employment because all identifiable job openings would have required her to work on Saturdays.[42] The Court held that a burden had been placed on the plaintiff's free exercise of her religion because the "ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand."[43]

Similarly, the plaintiff in *Thomas* v. *Review Board of the Indiana Employment Security Division* was denied unemployment compensation benefits after he was forced to quit his job following transfer to his employer's weapons production division; his faith as a Jehovah's Witness forbade him to engage directly in the production of arms.[44] The Court held that the denial of benefits placed a substantial burden on the plaintiff's practice of his faith:

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on

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41 146 Cong. Rec. S7776 (July 27, 2000).

42 374 U.S. 398 (1963).

43 *Id.* at 1794.

44 450 U.S. 707 (1981).

an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists.[45]

In *Lyng* v. *Northwest Indian Cemetery Protective Association*, the government wanted to build a road through an area of public land that was used by several Native American tribes. The plaintiff, a Native American organization, sought to block construction of the road, arguing, among other things, that construction of the road would substantially burden the practice of their faith.[46] The Court, in denying these plaintiffs' First Amendment claim, rejected any reading of *Thomas* or *Sherbert* that implied that "incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs, require government to bring forward a compelling justification for its otherwise lawful actions."[47]

Our consideration of the plain wording of the statute, its legislative history, the decisions of other circuits, and the Supreme Court's pronouncements on the meaning of "substantial burden" in other contexts leads us to hold that, for purposes of applying the RLUIPA in this circuit, a government action or regulation creates a "substantial burden" on a religious exercise if it truly pressures the adherent to significantly modify his religious behavior and significantly violate his religious beliefs. And, in line with the foregoing teachings of the Supreme Court, the effect of a government action or regulation is significant when it either (1) influences the adherent to act in a way that violates his religious beliefs, or (2) forces the adherent to choose between, on the one hand, enjoying some generally available,

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[45] *Id.* at 717-18.

[46] 485 U.S. 439 (1988).

[47] *Id.* at 450-51.

non-trivial benefit, and, on the other hand, following his religious beliefs.[48] On the opposite end of the spectrum, however, a government action or regulation does not rise to the level of a substantial burden on religious exercise if it merely prevents the adherent from either enjoying some benefit that is not otherwise generally available or acting in a way that is not otherwise generally allowed.[49] We emphasize that no test for the presence of a "substantial burden" in the RLUIPA context may require that the religious exercise that is claimed to be thus burdened be central to the adherent's religious belief system. This is because, as noted above, the RLUIPA defines religious exercise as "any exercise of religion, *whether or not compelled by, or central to,* a system of religious belief."[50] Nevertheless, the Supreme Court's express disapproval of any test that would require a court to divine the centrality of a religious belief[51] does not relieve a complaining adherent of the burden of demonstrating the honesty and accuracy of his contention that the religious practice at issue is important to the free exercise of his religion.

In sum, we are satisfied that the position we adopt today is faithful to both the text of the RLUIPA and Supreme Court precedent. Declining to inquire into whether a practice is central to an adherent's religion avoids the greater harm, identified in *Lyng* and in the text of the *Smith* opinion, of

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[48] *See Sherbert* and *Thomas*.

[49] *See Lyng*.

[50] *See* 42 U.S.C. § 2000cc-5(5)(emphasis added).

[51] *See Lyng*, 485 U.S. at 457-58 (criticizing the dissent's proposed test which would require a court to evaluate the "centrality" of a religious belief); *see also Smith*, 494 U.S. at 886-87 ("It is no more appropriate for judges to determine the 'centrality' of religious beliefs before applying a 'compelling interest' test in the free exercise field, than it would be for them to determine the 'importance' of ideas before applying the 'compelling interest' test in the free speech field.")

having courts presume to determine the place of a particular belief in a religion. These precedents instruct that, like determinations regarding the importance of ideas in the free speech field, judges are ill-suited to resolve issues of theology in myriad faiths. If refusing to inquire into the centrality of a religious practice should lead to undesirable results, Congress is the appropriate body to address that problem,[52] particularly in light of its own declaration in the text of the RLUIPA that centrality is not an element of religious exercise for purposes of this Act.

We recognize that our test requires a case-by-case, fact-specific inquiry to determine whether the government action or regulation in question imposes a substantial burden on an adherent's religious exercise; however, we perceive this kind of inquiry to be unavoidable under the RLUIPA and the circumstances that it addresses. This is why we make no effort to craft a bright-line rule.

Turning to the instant case, the evidence shows that Adkins was and is prevented from congregating with other YEA members on many Sabbath and YEA holy days. This results, however, from a dearth of qualified outside volunteers available to go to Coffield on every one of those days, not from some rule or regulation that directly prohibits

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[52] Our entire discussion assumes that the RLUIPA is otherwise constitutional; we have not been asked to rule on the constitutionality of the statute. The question is currently the cause of a circuit split. *Compare Benning* v. *Georgia*, 391 F.3d 1299 (11th Cir. 2004) (holding that the RLUIPA is within Congress's spending clause powers, and that it does not violate the Establishment Clause); *Madison* v. *Riter*, 355 F.3d 310 (4th Cir.2003) (finding the RLUIPA does not violate the Establishment Clause); *Charles* v. *Verhagen*, 348 F.3d 601 (7th Cir.2003) (holding that the RLUIPA is within Congress's spending clause powers, and that it does not violate the Establishment Clause); *Mayweathers* v. *Newland*, 314 F.3d 1062 (9th Cir.2002) (same); *with Cutter* v. *Wilkinson*, 349 F.3d 257 (6th Cir.2003), *cert. granted*, 73 USLW 3229 (U.S. Oct. 12, 2004) (No. 03-9877) (holding the RLUIPA an unconstitutional violation of the Establishment Clause).

such gatherings. With the exception of Muslims who are subject to a special court order, every religious group at Coffield is required to have a qualified outside volunteer present on such occasions. Presently, Adkins and the other YEA members are permitted to gather any time that Healan is available to go to Coffield; and Sanchez testified at the *Flowers* hearing that Adkins and the other YEA members would be allowed to observe every YEA Sabbath and every YEA holy day on which a free world volunteer is present.

The requirement of an outside volunteer—which is a uniform requirement for all religious assemblies at Coffield with the exception of Muslims—does not place a substantial burden on Adkins's religious exercise. We admit to lingering concern about the prison authorities' refusal to allow the McEnanys to serve as volunteers so that Adkins and the other YEA members at Coffield could gather on days that Healan is not present, which in turn prevents YEA members from congregating on the same basis as other similarly situated religious groups. Our concerns are alleviated, however, by Sanchez's promise that the McEnanys will be allowed to serve as volunteers after they attend services with Healan a few times to familiarize themselves with the process of conducting such meetings. All things considered, we are convinced that the acts of the defendants have not placed a substantial burden on Adkins's free exercise of his YEA religion, within the contemplation of the RLUIPA.

E. DENIAL OF ADKINS'S MOTION TO SUBPOENA WITNESSES

Adkins's final claim is that the magistrate judge erred in refusing to allow him to subpoena defendant Reynolds, Chaplain Edwards, and inmates Bundage and Ingram. "A district court's refusal to issue a subpoena is reviewable only

for abuse of discretion."[53] Before we will hold that the district court abused its discretion by refusing to issue a subpoena, the proponent of the subpoena must show that relevant testimony was excluded, or that a substantial need for a witness's trial testimony existed.[54] Much of the information that Adkins claims the witnesses would testify to would be speculative or repetitive. Although it appears from Ingram's affidavit that he had some personal knowledge of the use of the chapel, this was not made at all clear in Adkins's subpoena request, so the magistrate judge did not abuse his discretion in refusing the subpoena request. We perceive no abuse of discretion here.

III. CONCLUSION

For the foregoing reasons, the district court's rulings and its dismissal of Adkins's claims, are, in all respects,

AFFIRMED.

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53 *Gibbs* v. *King*, 779 F.2d 1040, 1047 (5th Cir.1986).

54 *See Cupit* v. *Jones*, 835 F.2d 82, 86-87 (5th Cir.1987).

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

Civil Action No. 6:01cv244

DONALD ADKINS,

Plaintiff,

v.

DON KASPAR, ET AL.

Defendants.

Filed November 27, 2002

MEMORANDUM ADOPTING REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE AND ENTERING FINAL JUDGMENT

The Plaintiff Donald Adkins, proceeding *pro se*, filed this civil rights lawsuit under 42 U.S.C. §1983 complaining of alleged violations of his constitutional rights. This Court ordered that the matter be referred to the United States Magistrate Judge pursuant to 28 U.S.C. §636(b)(1) and (3) and the Amended Order for the Adoption of Local Rules for the Assignment of Duties to United States Magistrate Judges.

A hearing pursuant to *Flowers* v. *Phelps*, 956 F.2d 488, *modified in part on other grounds*, 964 F.2d 400 (5th Cir.

1992) was conducted on July 26, 2002, to allow the Magistrate Judge to make recommended findings of fact and conclusions of law. Following this hearing, on August 21, 2002, the Magistrate Judge issued a Report setting out these proposed findings and conclusions and recommending that Adkins' lawsuit be dismissed. Adkins filed objections to this Report on October 24, 2002.

The Court has conducted a careful *de novo* review of the pleadings in the cause, including the Plaintiff's complaint and summary judgment evidence, the testimony at the *Flowers* hearing, the Report of the Magistrate Judge, and the Plaintiff's objections thereto. The Court notes that in his objections, Adkins claims that the court "misled" him into thinking that the *Flowers* hearing was a hearing solely to gather evidence to determine if the case merited a trial or summary judgment. No such "misleading" took place; in fact, Adkins was aware that the *Flowers* hearing was different from a motion for summary judgment; he filed a motion on May 2, 2002, arguing that the *Flowers* hearing was unnecessary because his motion for summary judgment should be ruled on first.

Furthermore, the record shows that Adkins has disclaimed any request for monetary damages, instead seeking only injunctive relief. Consequently, he would not be entitled to a jury trial regardless of whether or not he had objected to the *Flowers* hearing in a timely manner, which he did not. *See, e.g., Wilson* v. *Bailey*, 934 F.2d 301, 305 n.4 (11th Cir. 1991). Adkins' objections regarding the *Flowers* hearing are without merit.

Upon the careful *de novo* review conducted by the Court, the Court has concluded that the Report of the Magistrate Judge is correct and that the Plaintiff's objections are without merit. It is accordingly

ORDERED that the Plaintiff's objections are overruled and the Report of the Magistrate Judge, including all

proposed findings of fact and recommended conclusions of law, is ADOPTED as the opinion of the District Court. It is further

ORDERED that the above-styled lawsuit be and hereby is DISMISSED with prejudice. This dismissal shall not count as a strike for purposes of 28 U.S.C. §1915(g). It is further

ORDERED that any motions which may be pending in this cause are hereby DENIED. Finally it is hereby

ORDERED that the Order of Reference to the United States Magistrate Judge is hereby VACATED. 28 U.S.C. §636 (b).

SIGNED this 27th day of November, 2002.

/s/ JOHN HANNAH, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

DONALD M. ADKINS #466787

v.

DON KASPAR, ET AL.

CIVIL ACTION NO. 6:01cv244

Filed August 21, 2002

REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE

The Plaintiff Donald Adkins, an inmate of the Texas Department of Criminal Justice, Institutional Division, proceeding *pro se*, filed this civil rights action complaining of alleged violations of his constitutional rights. The lawsuit has been referred to the undersigned United States Magistrate Judge pursuant to 28 U.S.C. 636(b)(1) and (3) and the Amended Order for the Adoption of Local Rules for the Assignment of Duties to United States Magistrate Judges. As defendants, Adkins named Don Kaspar, Administrator of the TDCJ-ID Chaplain's Program; Roy Garcia, the former Senior Warden of the Coffield Unit; Michael Sizemore, the Assistant Warden of the Coffield Unit; Kenneth Reynolds, the Senior Chaplain of the Coffield Unit; Larry Hart, an assistant chaplain at the Coffield Unit; Kevin Moore, the

new Senior Warden at the Coffield Unit; and Leonard Sanchez, the new Senior Chaplain at the Coffield Unit.

The defendants were ordered to answer and did so. Following this answer, the parties were ordered to file motions for to summary judgment. The plaintiff did so, but the defendants did not. The lawsuit was scheduled for a hearing pursuant to *Flowers* v. *Phelps*, 956 F.2d 488, *modified in part on other grounds*, 964 F.2d 400 (5th Cir. 1992), to allow the undersigned to make recommended findings of fact and conclusions of law. This hearing was held, without objections, on July 26, 2002.

The Testimony at the Flowers Hearing

Adkins' lawsuit concerns religious liberty. He is a member of a group known as Yahweh's Evangelical Assembly, an organization which contains certain elements of traditional Judaism as well as a belief in Yahshua (Jesus) as the Messiah. The Court does not question the sincerity of Adkins' faith. *See United States* v. *Ballard*, 322 U.S. 78, 86 (1943).

I. Thomas Hobbs

At the *Flowers* hearing, Adkins wished to call Thomas Hobbs, a free-world witness. Hobbs testified that he lived in Oklahoma and that he maintains a prison ministry in which he writes to encourage prison inmates who are trying to turn their lives around.

Hobbs said that he learned of Adkins from a man named Jerry Healan, an elder in Y.E.A. He stated that in March 2000, Adkins sent him a letter and asked him to forward it to prison officials, which Hobbs did.

Adkins offered Exhibits E, F, G, T, and T1. Exhibit E is a letter from Hobbs to Adkins stating that he is ready to mail out copies of a letter to the prison officials. Exhibit F is a cover letter dated March 13, 2000, from Hobbs to the TDCJ-ID Northern Regional Director, Mr. Shaw, informing

him that Adkins' letter was enclosed and stating that its purpose was to seek assistance in obtaining recognition of Y.E.A. within the prison.

Exhibit G is a letter from Adkins seeking help in gaining recognition for Y.E.A. This letter says that on December 19, 1999, Elder Jerry Healan was allowed to come to the Coffield Unit to baptize several inmates, including Adkins, and that Chaplain Reynolds was very helpful in making arrangements for this; however, Reynolds told Healan that he would not be able to make such arrangements in the future until a Volunteer Services Form had been filled out and Healan had gone through the proper channels of instruction for such occasions. Adkins says in the letter that these forms were completed and mailed in January of 2000 and that Healan desires to set up a class where he can come to the prison once a month, on the Sabbath (Saturday), with video tapes of sermons available for the other monthly Sabbaths. Adkins also listed various Holy Days, including the Sabbath, Passover, the Feast of Unleavened Bread (a seven-day feast), Pentecost, the Day of Trumpets, the Day of Atonement, the Feast of Tabernacles (a seven-day feast), and the Last Great Day.[1] Adkins also says that Y.E.A. should be accorded the same privileges as Muslim inmates because like the Muslims, they do not have an ample supply of clerics and laymen to conduct services.

Exhibit T is an affidavit from Hobbs staying that he sent copies of Adkins' letter to various TDCJ-ID personnel. Exhibit T-1 is a verbatim copy of Exhibit F except that it is addressed to Warden Hef at the Coffield Unit, rather than to the Northern Region Director.

Following the admission into evidence of these exhibits, Exhibits I and J. Exhibit I is an "Office-Offender Communication" from Don Kaspar to Adkins. This

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[1] Thus, there are approximately 70 Holy Days in a year, including the days covered by the week-long feasts.

communication states that Kaspar cannot determine, from what Adkins had supplied so far, whether the group with which Adkins had affiliated is an organized and documented group with a headquarters that could provide official documentation of Adkins' claims. He asked if the legal name of Adkins' group was "Assembly of Yahweh" or Yahweh's Evangelical Assembly," or it there was some other name under which it is legally incorporated. Kaspar expressed willingness to process Adkins' request according to TDCJ-ID policy and said that it would help if Adkins could answer those questions. Exhibit J is a letter from Hobbs to Kaspar saying that the information required would be supplied by Healan.

Adkins then offered Exhibit B, a letter from Hobbs to himself, assuring him that Healan was going to take care of supplying the information requested by Kaspar. This letter also states that the group had to be chartered under the name of Yahweh's Evangelical Assembly, according to Healan.

Adkins next offered Exhibits K, K-1, K-2, K-4, and T-3. Exhibit K is a letter from Adkins to Kaspar, dated April 24, 2000. This letter complained that lay-in passes had been cancelled for the Passover Sabbath as well as the two Sabbaths in the Feast of Unleavened Bread, despite the fact that these passes had previously been given. In the letter, Adkins offered the opinion that the lay-in passes had been cancelled in retaliation for his having made a formal request for religious meetings. He notes in the letter that Healan came to baptize them because Elder Jacob Meyer, of a group called the Assemblies of Yahweh, had refused to do so, saying that the inmates should wait until their release from prison. Adkins stated in the letter that the Assemblies of Yahweh in prison decided that they wanted to work with Healan, so he, Adkins, inquired of Chaplain Reynolds whether the inmates would have to be officially listed as "Yahweh's Evangelical Assembly," the name of Healan's group, rather than "Assemblies of Yahweh," in order to work

with Healan. In response, Reynolds wrote that the chaplaincy policy would be followed as closely as possible and that Adkins was listed as "Yahweh's Assembly."

Exhibit K-1 is an inter-office communication, dated October 28, 1998, from Chaplain Stan Cuyler to the supervisors in the Metal Fab Supervisors. This communication states that three inmates, including Adkins, are to be accommodated if possible with their request to be off work on the Sabbath, from Friday sundown to Saturday sundown. Adkins is identified in this communication as a member of the Assembly of Yahweh.

Exhibit K-2 is a Statement of Doctrine of the Assemblies of Yahweh. Exhibit K-4 is a letter dated January 8, 2000, from Healan to Adkins, stating that he has sent Adkins a copy of the Scriptures and acknowledging receipt of an article which Adkins wrote, saying that he, Healan, would edit it and send it out with the newsletter. Healan also said in the letter that he had applied for the Volunteer Services at the prison.

Exhibit T-3 is a letter from Hobbs to Kaspar dated May 3, 2000, referring to the denial of Adkins' lay-in passes and saying that this problem could have come about because of the name change for the group.

On cross-examination, Hobbs said that he operated his prison ministry himself, writing letters to inmates and visiting if possible. He acknowledged that he had religious correspondence with inmates, talking about Scriptures and religious issues.

II. Elder Jerry Healan

Jerry Healan, an elder in Yahweh's Evangelical Assembly from Atlanta, Texas, testified that he has a ministry which includes prison inmates. He stated that he has performed baptisms in prison, including the Coffield Unit as well as other prisons in Texas and out of state.

Healan stated that at the Coffield, inmates belonging to Y.E.A. get to meet one Sabbath a month, and do not get to meet if the prison is locked down. He said that there are about 40 inmates at Coffield on the mailing list, but only 25 to 30 who actually come to the meetings.

Healan testified that he first came to the Coffield Unit in December of 1999, when he baptized Adkins as well as other inmates. He stated that a person becomes a member of the Assembly upon baptism. He had called Chaplain Reynolds, whom he described as "positive," and Reynolds allowed him to come and perform the baptisms, but Healan stated that he was not permitted to come for regular meetings until he had gone through a volunteer training program.

Healan acknowledged that in order to get lay-ins, the inmates had to use the name "Yahweh's Evangelical Assembly." Adkins offered into evidence Exhibit A, the inter-office communication, referenced above, in which Adkins requested that his religious affiliation be changed to Y.E.A. and was told that the chaplaincy policy would be followed and that he was listed as "Yahweh's Assembly." He also offered Exhibit L, a letter from Healan to Adkins dated April 30, 2000, in which Healan noted that he had completed the volunteer training program and was ready to begin meeting with the inmates as soon as he received word that everything was OK. This letter also said that Healan had received Adkins' letter of March 6 requesting a Statement of Doctrine to be sent to TDCJ-ID, but that he had not been able to respond to this letter because he did not have a Statement of Doctrine nor Fundamentals of Faith; he said that he had just finished preparing the Fundamentals of Faith and had sent it out.

Adkins referred to Exhibit N, a grievance which he filed on May 30, 2000, regarding his difficulties. The response to this grievance was that Huntsville had confirmed that Healan had completed the volunteer course and a new programs

form is being forwarded, after Warden Garcia's approval, to Huntsville for final approval. If approved, Healan would then be able to come to the unit for meetings with inmates.

Healan indicated that he was not approved to come to the unit until August of 2000. On January 19, 2001, however, Healan wrote an affidavit referring to his April 30 letter and saying that he has to date received no response to it, nor have the conditions improved for the Y.E.A. inmates. Healan conceded at the *Flowers* hearing that conditions have improved since that time, in that the inmates are allowed to meet once a month, but that efforts to meet more often with other volunteers have not been availing.

On cross-examination, Healan described Yahweh's Evangelical Assembly as "his flock," saying that they "shared beliefs" with other groups. He estimated the size of Y.E.A. as being "about 50, or 100 if you count inmates." He said that other volunteers went through the TDCJ-ID training with him, but that these other persons were not part of Y.E.A.; they were elders in their own groups.

Healan stated that he lives in Atlanta, Texas, some 175 miles from Tennessee Colony, so it is difficult for him to get to the prison and visit the inmates. He stated that he regularly corresponds with Adkins by sending him religious materials, newsletters, and other articles. He acknowledged that these articles are helpful to Adkins and noted that Adkins has in fact written articles himself for the organization's newsletters.[2]

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[2] Some of the articles written by Adkins may be found online, at http://www.members.cox.net/arkiehobbs/page_34-1.htm and http://www.members.cox.net/thomasahobbs/yea _15-7.htm. These articles are quite scholarly and well-researched, indicating that Adkins has access to various source materials concerning his faith.

III. David Paul McEnany

David McEnany testified that he has recently retired from the Oklahoma Department of Corrections. He said that he, his wife, and his daughter work with a religious group called the Sabbath Keepers and that he has taken the TDCJ-ID volunteer training twice.

McEnany said that he wanted to go minister to inmates at the Coffield Unit, and that he has agreed to help Healan. However, he said that he is not allowed to come to Coffield by himself, although he is allowed to accompany Healan on the first Sabbath of each month.

IV. Nancy McEnany

Nancy McEnany testified that she works with her husband David in prison ministry. She said that she also has completed the TDCJ-ID volunteer training course, but is not allowed to come into the prison except with Healan on the first Sabbath of each month.

Nancy McEnany stated that the Sabbath Keepers is "basically" the same as Y.E.A. She acknowledged that she had no official church position, but was simply a lay person.

V. Donald Adkins

Adkins testified that on December 19, 1999, he was baptized by Jerry Healan. He said that he has been in prison since 1987 and that he wants to change his life because if he does not, he has nothing to get out of prison for.

Adkins argued that TDCJ-ID Administrative Directive 07.30 applies to members of all religious faiths, and says that it is intended to allow all inmates equal access to religious services. However, Adkins said, Christians get services every week, Jehovah's Witnesses get services once a week, and Muslims get services twice a week. He added that Muslims are allowed to observe a month-long feast called Ramadan, in which they do not eat until after sundown.

Adkins contended that Y.E.A. inmates are not allowed to observe feast days or holy days. He said that they were not permitted to assemble for feast days and foot-washing ceremonies. He stated that the foot-washing day was the most important holy day of the year, but he doesn't get to celebrate it.[3]

Adkins said that he is forbidden from working on the Sabbath, but acknowledged that he has a job which does not require work on Saturdays. He complained that when he filed grievances, the TDCJ-ID officials did not follow their own regulations, because a committee was supposed to meet to work out accommodations.

Adkins conceded that an arrangement was set up for Y.E.A. inmates to have weekly sessions on Mondays to watch video tapes and audio tapes supplied by Healan. However, when he asked Chaplain Sanchez to move these tape sessions to Saturdays, Sanchez refused, saying "not without a free world religious volunteer being present." When Adkins asked why they could not be treated like the Muslims, he says that Sanchez replied that they were not going to talk about the Muslims because "we all know what they had to go through to get what they got."

Adkins offered Exhibit X, listing a substantial number of Assemblies of Yahweh cassette tapes and videos, including several under the subheading of "Yahweh's Evangelical Assembly," and Exhibit Y, an affidavit signed by a number of inmates relating the conversation between Adkins and Sanchez. This affidavit is hearsay and repetitive of Adkins' own testimony, and thus has little or no evidentiary value in and of itself.

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[3] In Exhibit G, a document which Adkins wrote, he said that Passover is the day of foot-washing and that the Day of Atonement is the holiest day of the year.

Adkins also offered Exhibit V, which is an inter-office communication from Chaplain Reynolds dated October 26, 1999, notifying TDCJ-ID personnel that inmates belonging to the Assembly of Yahweh adhere to the Saturday Sabbath and must be given time off from his job assignment for this observance, and Exhibit C, which is an inter-office communication from himself to Chaplain Reynolds, asking that his religious affiliation be changed from Assemblies of Yahweh to Yahweh's Evangelical Assembly. The response to this, dated May 24, 2000, reads simply "Processed," and is signed by Chaplain Reynolds.

The next day, May 25, 2000, Adkins wrote a request to Warden Garcia asking for a warden's interview regarding the procedures in getting Healan to be able to come to Coffield and establish a Bible study class (Exhibit M). The warden's response to this was that Adkins should contact Chaplain Reynolds.

Adkins next offered two grievances, Exhibit O and Exhibit P. Exhibit O is a Step One grievance dated July 10, 2000, complaining that he filed a grievance on May 30 which never received a response. Exhibit P is a Step Two grievance, dated July 13, 2000, in which Adkins complained that he is not being allowed to observe all of his Sabbaths and feast days. He points out that Healan completed the volunteer training class in April of 2000 and that Healan has requested that Y.E.A. be allowed to meet on the Sabbath without a free-world religious volunteer, like the Muslims do, because there are not enough free-world volunteers to come oversee them on all of the feast days. Adkins also complained in this grievance that he spoke with Reynolds on June 28, 2000, and Reynolds told him that Warden Garcia would not allow them to meet on all of their Sabbaths and holy days without a free-world volunteer; instead, all they get is Bible study once a month. The response to the grievance, dated August 10, 2000, was that the issue had

been resolved because Healan had been approved and services are being provided as per the volunteer's availability.

Adkins stated that he believed he had done everything he could do. He said that he did not want monetary damages from his lawsuit, but just wants to be allowed to practice his faith. In effect, he seeks a permanent injunction.

On cross-examination, Adkins acknowledged that he was allowed to possess and read his Bible. He added that Healan and other persons have sent religious materials to him and that he has personal correspondence with free-world individuals as well as other inmates.

Adkins stated that he is housed in general population, so he is able to come into contact with other Y.E.A. inmates. He acknowledged that the inmates meet with Healan once a month, and said that Chaplain Reynolds told him that they could meet more often if they had more free-world volunteers. Adkins said that there were about 20 to 40 members of Y.E.A. at the Coffield Unit.

Adkins described himself as "basically a heathen" when he came into prison in 1987. He said that everything that he has learned about his faith has been learned in prison.

VI. Chaplain Sanchez

Chaplain Sanchez testified that he has worked at TDCJ-ID for four and a half years and is the Senior Chaplain at the Coffield Unit. He said that the Y.E.A. inmates meet with Healan on the first Sabbath of the month, and that Healan would come more often if he could.

Sanchez noted that Adkins receives lay-ins on each of his holidays. He said that he tried to make accommodations for Adkins on the Feast of Unleavened Bread, even supplying the inmates with unleavened wafers one year. This past year, Sanchez said, Healan furnished 30 bags of unleavened bread, and there were eight or nine bags left over after the feast.

Chaplain Sanchez said that he was familiar with Administrative Directive 07.30. He said that there are approximately 3,200 inmates at the Coffield Unit, and that there are about 150 recognized faith groups within TDCJ-ID. He said that Y.E.A. was classified under the general heading of "Protestant," although they do not consider themselves to be such.

Sanchez stated that he schedules activities for the faith groups in the chapel. Because Adkins' group is a smaller one, this factor must be considered when making up the schedule. Sanchez said that there is not sufficient space or time slots, or security personnel to allow all of the faith groups to meet without volunteers.

Sanchez observed that Adkins wants to conduct his own services, but that this is not permitted. He said that Muslims are permitted to do so because they have a court order which allows it; furthermore, Sanchez noted, there are coordinators on the unit for Muslims. He added that there were approximately 250 Muslims at the Coffield Unit.

On cross-examination, Chaplain Sanchez testified that it is TDCJ-ID policy to offer all faith groups equal access, given considerations of time, space, and available security. He stated that certain faith groups, including the Jehovah's Witnesses and the Mormons, are permitted to conduct meetings without a free-world volunteer being present if the meeting was a regularly scheduled one and the free-world volunteer was unable for some reason not to attend, such as a car accident. He reiterated that the audio and video tapes were available for the Y.E.A. inmates on Mondays.

Recommended Findings of Fact

Based on the totality of the evidence before the Court, the Court recommends that the following findings of facts be made. *Flowers* v. *Phelps*, 956 F.2d 488, 489, *modified in*

part on other grounds, 964 F.2d 400 (5th Cir. 1992); 28 U.S.C. 636(b)(1)(B).

1. The plaintiff Donald Adkins is a member of a religious organization called Yahweh's Evangelical Assembly (Y.E.A.).

2. There are approximately 20 to 25 active, participating members of Y.E.A. at the Coffield Unit, as well as some 15 others who receive literature. The number of active inmates represents approximately seven-tenths of one percent of the 3,200 inmates confined at the Coffield Unit.

3. The total membership of Y.E.A., including persons in the free world, is approximately 100 persons.

4. The church elder, Jerry Healan, lives in Atlanta, Texas, some 175 miles from the Coffield Unit, and comes to the prison once a month on the Sabbath for worship services with the inmates.

5. The Y.E.A. inmates are given lay-ins for their feast days and holy days; Adkins himself has a job which does not require work on the Sabbath.

6. Video and audio tapes are available in the chapel on Mondays for Y.E.A. inmates.

7. The prison has accommodated Y.E.A. inmates in the Feast of Unleavened Bread by supplying unleavened wafers and by receiving unleavened bread from Elder Healan.

8. The Y.E.A. inmates are permitted to and do receive religious literature from outside persons for purposes of study and edification.

9. Adkins himself has written articles for publication in the Y.E.A. newsletter, which articles show that he has learned a great deal about his faith while in prison and that he has access to source materials with which to do research.

10. Other accommodations are available through TDCJ-ID Directive 07.30.

Legal Standards and Analysis

The Fifth Circuit has held that all prisoners are entitled to a reasonable opportunity to exercise religious freedom. *Pedraza* v. *Meyers*, 919 F.2d 317, 320 (5th Cir. 1990). However, the fact that an inmate is not permitted to attend all of the religious services which he wishes to attend does not raise a valid claim for relief. *Green* v. *McKaskle*, 788 F.2d 1116, 1126 (5th Cir. 1986). Furthermore, the Supreme Court has observed that while reasonable opportunities must be extended to all prisoners to exercise religious freedom, this does not mean that adherents of smaller religious groups must receive facilities or personnel identical with more populous denominations. *Cruz* v. *Beto*, 405 U.S. 319, 322 n.2, 92 S.Ct. 1079, 1081 n.2 (1972); *Kahey* v. *Jones*, 836 F.2d 948, 950 n.1 (5th Cir. 1988) (citing Cruz).

In this case, as noted above, the evidence shows that Yahweh's Evangelical Assembly has approximately 40 inmates on the mailing list at the Coffield Unit, with about 25 to 30 who actually attend services. When Healan provided bags of unleavened bread for use in a feast, 21 or 22 of these bags were used, with eight or nine being left over. This means that approximately seven-tenths of one percent of the population of the Coffield Unit is an attendee of Y.E.A. services.

The preponderance of the credible evidence shows that is permitted to have live services once a month, when their elder, Jerry Healan, is able to attend. These services would be permitted more often if Healan were able to come more frequently, but he lives in Atlanta, some 175 miles from the Coffield Unit. The evidence also shows that Y.E.A. members are able to get lay-ins from work on their holy

days,[4] that efforts are made to accommodate their feasts, including the Feast of Unleavened Bread, and that tapes of sermons are made available to them. Adkins has failed to show that these accommodations are not reasonable.

This conclusion is buttressed by the obvious access to the materials of his faith which Adkins has shown. He has written scholarly, well-researched articles which have been published in the Y.E.A. newsletter, indicating both maturity in his faith and access to the research sources. Adkins stated that he entered TDCJ-ID as a "heathen," and plainly has been able to learn a great deal about his faith during his incarceration.

Adkins argues that the Muslims at the Coffield Unit are given more latitude and more privileges than are adherents of Y.E.A. Specifically, he contends that the Muslims are permitted to conduct services without a free-world volunteer being present, while Y.E.A. cannot do so. However, court records show that in the summer of 2000, there was a Muslim chaplain, Abdullah Rashid, at the Coffield Unit.[5] More pertinently, the evidence in this case shows that there are approximately ten times as many Muslims at the Coffield Unit as there are adherents of Y.E.A.

Furthermore, as Adkins concedes, to the extent that the Muslims are permitted more latitude in holding services run entirely by inmates, without the presence of free-world volunteers or the Muslim chaplain, the evidence shows that there was a court order permitting the Muslims to do so. Adkins has not shown that, even if Muslims are permitted to hold services without outside volunteers being present, this causes him to be denied reasonable opportunities to practice his faith.

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[4] Adkins conceded that he personally was not required to work on the Sabbath

[5] *See Green v. Author*, docket no. 6:00cv734, E.D. Tex.).

Although Adkins contends that TDCJ-ID's practices violate Administrative Directive 07.30, he has failed to make such showing. Even if he did, however, this would not entitle him to relief. The Fifth Circuit has held that a violation of prison rules alone is not sufficient to rise to the standards of a constitutional claim. *Myers* v. *Klevenhagen*, 97 F.3d 91, 94 (5th Cir. 1996); *Hernandez* v. *Estelle*, 788 F.2d 1154, 1158 (5th Cir. 1986). To the extent that Adkins' claim is premised on the constitutional standards set out by the Supreme Court, it is without merit.

As stated above, Adkins does not seek monetary damages, but rather permanent injunctive relief. To win a permanent injunction, a petitioner must show a clear threat of continuing illegality portending immediate harmful consequences irreparable in any other manner. *Posada* v. *Lamb County, Texas*, 716 F.2d 1066, 1070 (5th Cir. 1983). He has failed to make such a showing.

The Religious Land Use & Institutionalized Persons Act

The RLUIPA, codified at 42 U.S.C. 2000cc, was enacted on September 22, 2000, partially in response to the Supreme Court's decision in *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), declaring the Religious Freedom Restoration Act unconstitutional. In pertinent part, 42 U.S.C. §2001cc-1 reads as follows:

(a) General rule

No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 1997 of this title, even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person—

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(b) Scope of application

This section applies in any case in which—

(1) the substantial burden is imposed in a program or activity that receives Federal financial assistance; or

(2) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes.

The first issue to be noted concerning RLUIPA is that at the time of the events giving rise to this lawsuit, the statute had not yet been enacted. The courts are split on whether or not RLUIPA can be applied retroactively. *Compare Prater* v. *City of Burnside, Kentucky*, 289 F.3d 417, 432 (6th Cir. 2002) (holding that the Act could be applied, despite the fact that the challenged conduct occurred before the Act was enacted) *with Wilson* v. *Moore*, docket no. 4:01cv158-RV, 15 Fla. L. Weekly Fed. D. 211 (available on WESTLAW at 2002 WL 950062) (N.D. Fla. 2002) (holding that RLUIPA could not be applied retroactively because to do so would attach new legal consequences to conduct already completed). Because the Defendants wholly failed to raise or argue this issue, the Court will assume that RLUIPA can be applied retroactively for purposes of Adkins' request for injunctive relief.[6]

As stated above, RLUIPA prohibits the State from imposing a "substantial burden" on the practice of religious faith. A "substantial burden" is one which forces adherents of a religion to refrain from religiously motivated conduct, inhibits or constrains conduct or expression which manifests a central tenet of a person's religious beliefs, or compels

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[6] The Defendants also failed to raise or argue the issue of whether or not the challenged programs in this case receive federal funding so as to fall under RLUIPA's ambit.

conduct or expression that is contrary to those beliefs. *Mack* v. *O'Leary*, 80 F.3d 1175, 1178 (7th Cir. 1996).

In this case, Adkins has failed to show that TDCJ-ID has "substantially burdened" the practice of his religion. The evidence shows that adherents of Y.E.A. are permitted to gather once a month for worship under the guidance of their free-world elder, Jerry Healan, and that audio and video tapes are available on a weekly basis for their use. These inmates are permitted to correspond with free-world persons and to receive religious materials and newsletters for their instruction and edification. Adkins himself not only receives such items, but has written articles for publication; these articles which he has written show that he has access to source materials for research.

Adkins contends that the fact that Y.E.A. inmates are permitted to gather only once a month for communal worship is a "substantial burden" on the practice of his religion. However, the courts have held that reasonable time, place, and manner restrictions do not substantially burden the practice of religious faith. *Diaz* v. *Collins*, 114 F.3d 69, 72 n.14 (5th Cir. 1997) (*citing Johnson* v. *Baker*, 67 F.3d 299 (6th Cir. 1995) (unpublished) *and Abdur-Rahman* v. *Michigan Dept of Corrections*, 65 F. 3d 489 (6th Cir. 1995). In *Diaz*, the Plaintiff, an adherent of a Native American religion, complained of various aspects of his faith which he was not permitted to practice. This included the long hair, which under the tenets of Diaz's faith is to be cut only in times of grief or sorrow and the keeping of a medicine pouch and a Native American headband. This Court concluded that TDCJ-ID's regulations requiring Diaz to cut his hair and that he not wear a headband or possess his pouch outside of his cell did not substantially burden Diaz's free exercise of his religion. *Diaz* v. *Collins*, 872 F.Supp. 353, 356 (E.D.Tex. 1994), *aff'd* 114 F.3d 69 (5th Cir. 1997). Similarly, restricting Y.E.A. adherents to meetings once per month, with available lay-ins for other religious holy days and tape

lessons available weekly, is not a substantial burden upon the practice of their faith.[7]

Although Adkins complained that for a period of several months in 2000, he was not receiving lay-ins on his holy days, the preponderance of the credible evidence at the hearing showed that this situation had now been corrected. Accordingly, Adkins' request for injunctive relief on this point, as well as his claims regarding the difficulties which he experienced in getting his religious preference changed to Y.E.A., are moot. *See Rocky* v. *King*, 900 F.2d 864, 867 (5th Cir. 1990).

Adkins also contended that the Y.E.A. inmates were not permitted to perform certain ceremonies such as foot-washing, which he said was done on the Day of Pentecost. However, given that the organization was allowed to meet once per month, Adkins offered no reason why this ceremony could not be performed during one of the monthly meetings, nor does he show that the monthly meeting could not be scheduled for the Day of Pentecost. He also complained that the Y.E.A. inmates were not allowed to celebrate their feasts, but the evidence showed that the prison officials made arrangements for the celebration of such feasts, including the Feast of Unleavened Bread, for which unleavened bread was in fact provided.

Adkins argues in his motion for summary judgment that the defendants can readily accommodate his feast days by providing a meal after sundown when the day calls for a fast and by providing space in the chapel or elsewhere for the

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[7] Adkins stated that failure to assemble for worship on the Holy Days amounted to "sin," for which the penalty is "death." Without disparaging the sincerity of Adkins' religious belief, the Court notes that in *Diaz*, the inmate also testified as to the significance of certain practices in which he was not allowed to engage, but the significance of these practice alone did not mean that their curtailment necessarily was a "significant burden" upon the practice of his religion. *See Diaz*, 114 F.3d at 72.

inmates to listen to a taped sermon. However, Adkins' implied premise that a religious organization claiming approximately 25 adherents on a prison unit housing some 3,200 men is entitled to equal personnel and facilities as larger groups such as Muslims is simply incorrect. As noted above, the size of a religious group does not impugn the quality of its beliefs, but it can affect the space, time, and facilities which must be provided for it in a prison environment. Adkins simply has not shown that the accommodations provided for Yahweh's Evangelical Assembly substantially burden the practice of his faith, nor has he shown himself entitled to a permanent injunction under the Religious Land Use and Institutionalized Persons Act. His claims are without merit.

Recommended Conclusions of Law

Based on the above recommended findings of fact and analysis of the proper standards, the Court recommends that the following conclusions of law be made. *Flowers*, 956 F.2d at 489.

1. The defendants in this lawsuit did not violate the right of the plaintiff Donald Adkins to a reasonable opportunity to exercise religious freedom.

2. The defendants in this lawsuit did not impose a substantial burden upon the right of the plaintiff Donald Adkins to exercise religious freedom.

3. The defendants in this lawsuit did not otherwise violate the Constitution or laws of the United States with regard to the religious freedom of the plaintiff Donald Adkins.

RECOMMENDATION

It is accordingly recommended that the above proposed findings of fact and conclusions of law be adopted as the findings and conclusions of the District Court and that, based on these findings and the adoption thereof, the plaintiff's lawsuit be dismissed with prejudice. It is further

recommended that the plaintiff's motion for summary judgment, filed November 9, 2001, be denied.

A party's failure to file objections to the findings, conclusions, and recommendations contained in this Report within ten days after service with a copy thereof shall bar that party from *de novo* review by the district judge of those findings, conclusions, and recommendations and, except upon grounds of plain error, from appellate review of the unobjected-to factual findings and legal conclusions accepted and adopted by the district court. *Douglass* v. *United Services Automobile Association*, 79 F.3d 1415, 1430 (5th Cir. 1996) (*en banc*).

SIGNED this 21st day of August, 2002.

/s/ HARRY W. McKEE
UNITED STATES MAGISTRATE JUDGE

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 03-40028

DONALD M ADKINS,
Plaintiff-Appellant

v.

DON KASPAR, Chaplaincy Department; ROY A GARCIA, Warden, Coffield Unit; MICHAEL W SIZEMORE, Assistant Warden, Coffield Unit; KENNETH M REYNOLDS, Chaplain, Coffield Unit; LARRY HART, Assistant Chaplain, Coffield Unit; KEVIN MOORE, Senior Warden, Coffield Unit; LEONARD SANCHEZ, Senior Chaplain, Coffield Unit,

Defendants-Appellees

Filed March 10, 2005

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE
EASTERN DISTRICT OF TEXAS, TYLER

Before GARWOOD, WIENER and DeMOSS, Circuit Judges.

PER CURIAM:

IT IS ORDERED: that the appellant's motion to recall the mandate is DENIED.

IT IS FURTHER ORDERED that the appellant's motion to vacate the court's December 8, 2004, opinion and judgment is DENIED.

IT IS FURTHER ORDERED that the appellant's motion to remand with instructions that the original complaint be dismissed for apparent lack of jurisdiction is DENIED.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 03-40028

DONALD M. ADKINS,
Plaintiff-Appellant,

v.

DON KASPAR, ET. AL.,
Defendants-Appellees.

DEFENDANTS-APPELLEES KASPAR, GARCIA, SIZEMORE, REYNOLDS, HART, MOORE AND SANCHEZ'S RESPONSE AND OPPOSITION TO PLAINTIFF'S MOTION TO RECALL MANDATE AND VACATE DECISION FOR APPARENT LACK OF JURISDICTION

TO THE HONORABLE JUDGES OF THE COURT OF APPEALS:

On December 8, 2004, this Court issued its opinion in this case. Adkins, a member of the Yahweh Evangelical Assembly, had filed this action alleging a violation of his constitutional rights and of the Religious Land Use and Institutionalized Persons Act (RLUIPA) arguing he was not being permitted to practice his faith. The district court had dismissed the case, and this Court affirmed, issuing an important decision, noting, "[w]hat constitutes a 'substantial burden' under the RLUIPA is a question of first impression in this circuit."[1] Adkins now seeks to vacate that significant

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[1] *Adkins* v. *Kaspar*, 393 F.3d 559, 568 (5th Cir. 2004).

decision, arguing that it was moot at the time it was issued due to his failure to move to withdraw the appeal, and that it is "an adverse judgment that conflicts with the decisions of other circuits."

> Under Rule 41.2 of the Fifth Circuit Rules, we may recall our mandate if necessary in order to prevent injustice. An example of such an injustice is when a subsequent decision by the Supreme Court renders a previous appellate decision demonstrably wrong. *See, e.g., Greater Boston Television Corp.* v. *F.C.C.*, 463 F.2d 268, 278 n.12 (D.C.Cir.1971). Recalling the mandate is also appropriate "where there is a danger of incongruent results in cases pending at the same time." See *American Iron & Steel Inst.* v. *Environmental Protection Agency*, 560 F.2d 589, 594 (3d Cir.1977); *see also Greater Boston*, 463 F.2d at 278-79.[2]

If a case becomes moot on appeal, the general rule is to vacate the judgment of the lower court and remand with instructions to dismiss the case as moot.[3] However, this doctrine is an equitable one.[4] As the Supreme Court has noted, "[f]rom the beginning we have disposed of moot cases in the manner 'most consonant to justice' * * * in view of the nature and character of the conditions which have caused the case to become moot."[5] In one case, that Court refused to grant a request that it vacate its own previously issued decision after being informed on petition for rehearing that

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2 *United States* v. *Tolliver*, 116 F.3d 120,123 (5th Cir. 1997).

3 *Goldin* v. *Bartholow*, 166 F.3d 710, 718-19 (5th Cir. 1999) (citing *United States* v. *Munsingwear*, 71 S. Ct. 104,106-07 (1950)).

4 *Id.*

5 *U.S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 115 S. Ct. 386, 391 (1994) (citation omitted).

the appellant had died before the filing of the Supreme Court's opinion.[6]

In this case, it is not necessary to withdraw the mandate to prevent injustice, and both justice and a balancing of the equities favors retaining the decision and mandate. This is not a case in which a subsequent decision by the Supreme Court has rendered the opinion in this case wrong, nor is it one in which there is a danger of incongruent results in cases pending at the same time. Although Adkins argues that the opinion should be vacated because it is an "adverse judgment that conflicts with the decisions of other circuits" this argument actually presents a strong reason why the decision and mandate should stand. As this Court is fully aware, Texas has one of the largest prison populations in the United States, and many lawsuits are filed each year by prisoners.[7] Until this decision was issued, there were no guidelines in this circuit detailing the analysis to use in claims brought under the RLUIPA. A decision declaring and clarifying the law is of utmost importance and, in light of the complete absence of case law interpreting the RLUIPA in this circuit, it would not be prudent to withdraw the opinion.[8]

There is no unfairness to Adkins in allowing the decision to stand.[9] He had a full and fair opportunity to present his case, and the mere fact that this Court decided the case contrary to what Adkins believes to be the proper standard is not a sufficient reason to withdraw the opinion.[10] Because he

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6 *Robinson* v. *California*, 83 S. Ct. 202 (1961) (order denying petition for rehearing with dissent).

7 *See Ex parte Rieck*, 144 S.W.3d 510 (Tex. Crim. App. Sep 15, 2004).

8 *Humphreys* v. *Drug Enforcement Admin.*, 105 F.3d 112, 116 (3rd Cir. 1996).

9 *Id.*

10 *Id.*

is no longer incarcerated, Adkins can now worship as he pleases, and the opinion of this Court has no impact on him. However, the decision is authoritative to Defendants, and equity favors its retention.

On November 8, 2004 the lower court received a change of address from Adkins. However, Adkins did not request that the appeal be withdrawn.[11] Rather, he waited until this Court rendered its' opinion and then, displeased with it, he sought counsel in order to file a petition for a writ of certiorari. Adkins has a remedy for his complaint that this Court's opinion is "an adverse judgment that conflicts with the decisions of other circuits. As he acknowledges, he can file a petition for a writ of certiorari, which is what he intended to do at the time he sought counsel.

Wherefore, Defendants-Appellants request this Court to deny Adkins' motion to recall the mandate and vacate its decision.

Respectfully submitted,

GREG ABBOTT
Attorney General of Texas

BARRY R. McBEE
First Assistant Attorney General

EDWARD D. BURBACH

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[11] Despite Adkins' attempt to blame Defendants for the failure to withdraw the appeal, contending that "Defendant prison officials" failed to advise this Court of his release, there is no such duty on the part of Defendants. To the contrary, as this Court is aware, prisoners proceeding *in forma pauperis* are advised from the beginning of legal action that it is *their* duty to keep the court advised of their address. Additionally, the record on appeal clearly showed that Adkins, although proceeding *pro se*, effectively represented himself, filing numerous motions and fully briefing his arguments.

Deputy Attorney General for Litigation

DAVID A. TALBOT, JR.
Assistant Attorney General
Chief, Law Enforcement Defense Division

/s/ M. CAROL GARDNER
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ATTORNEYS FOR DEFENDANTS-APPELLEES KASPAR, GARCIA, SIZEMORE, REYNOLDS, HART, MOORE AND SANCHEZ

CERTIFICATE OF SERVICE

I, M. CAROL GARDNER, Assistant Attorney General of Texas, do hereby certify that a true and correct copy of the above and foregoing Defendants-Appellees Kaspar, Garcia, Sizemore, Reynolds, Hart, Moore and Sanchez's Response and Opposition to Plaintiff's Motion to Recall Mandate and Vacate Decision for Apparent Lack of Jurisdiction has been served by placing same in the United States Mail, certified, return receipt requested, postage prepaid, on this the 17th day of February, 2005, addressed to:

Gregory G. Garre **CM/RRR NO. 7004 0750 0000 6764 7906**
Michelle D. Morris
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D. C.

Derek L. Gaubatz **CM/RRR NO. 7004 0750 0000 6764 7913**
The Becket Fund for Religious Liberty
1350 Connecticut Avenue, N.W., Suite 605
Washington, D.C. 20036

/s/ M. CAROL GARDNER
Assistant Attorney General

APPENDIX F

STATUTORY PROVISIONS INVOLVED

Title 42, United States Code

§ 2000cc—1. Protection of religious exercise of institutionalized persons

(a) General rule

No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as, defined in section 1997 of this title, even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person—

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(b) Scope of application

This section applies in any case in which—

(1) the substantial burden is imposed in a program or activity that receives Federal financial assistance; or

(2) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes.

* * *

§ 2000cc—2. Judicial Relief

* * *

(b) Burden of persuasion

If a plaintiff produces prima facie evidence to support a claim alleging a violation of the Free Exercise Clause or a violation of section 2000cc of this title, the government shall

bear the burden of persuasion on any element of the claim, except that the plaintiff shall bear the burden of persuasion on whether the law (including a regulation) or government practice that is challenged by the claim substantially burdens the plaintiff's exercise of religion.

§ 2000cc—3. Rules of construction

(a) Religious belief unaffected

Nothing in this chapter shall be construed to authorize any government to burden any religious belief.

(b) Religious exercise not regulated

Nothing in this chapter shall create any basis for restricting or burdening religious exercise or for claims against a religious organization including any religiously affiliated school or university, not acting under color of law.

(c) Claims to funding unaffected

Nothing in this chapter shall create or preclude a right of any religious organization to receive funding or other assistance from a government, or of any person to receive government funding for a religious activity, but this chapter may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise.

* * *

(g) Broad construction

This chapter shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution.

* * *

§ 2000cc—5. Definitions

In this chapter:

* * *

(7) Religious exercise

(A) In general

The term "religious exercise" includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.

(B) Rule

The use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose.